

Missouri. Supreme court



CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE

STATE OF MISSOURI.

2857 F

JAS. B. GARDENHIRE,
ATTORNEY GENERAL AND EX-OFFICIO REPORTER.

EDITED BY
E. W. PATTISON,
OF THE ST. LOUIS BAR.

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JUDGES
OF THE
SUPREME COURT OF THE STATE OF MISSOURI.

HON. HAMILTON R. GAMBLE.
HON. JOHN F. RYLAND.
HON. WILLIAM SCOTT.

ATTORNEY GENERAL :
JAS. B. GARDENHIRE.

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DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF MISSOURI,
OCTOBER TERM, 1851.

HAMILTON and TREAT, Judges, *v.* St. Louis County Court.

15 Mo. 3.

1. *Laws—Construction.*—The act of March 3, 1851, to increase the salaries of the judges in St. Louis county, does not leave the payment of additional compensation discretionary with the County Court.
2. *Taxation.*—The 19th section of the declaration of rights does not require equality in taxation. The property to be taxed is left to the discretion of the General Assembly; but, when selected it must be taxed in proportion to its value.^(a)
3. *Constitutional Law.*—An act of the General Assembly authorizing and requiring a County Court to pay out of the county treasury an additional compensation to judges who receive a stated salary from the State, is not repugnant to the 7th and 19th sections of the declaration of rights.^(b)

SPALDING and FIELD, for relators.

BATES and GANTT, *contra.*

GAMBLE, J., delivered the opinion of the court. [20]

In these cases the relators, judges of the circuit and common pleas courts, of the county of St. Louis, having presented their accounts to the county court of said county, for the additional

^(a) Constitution of Mo., art. I, sec. 30.

^(b) *Id.*, sec. 16.

compensation provided for in the act of the 3d of March last, and the county having refused to allow the accounts, have obtained writs of conditional mandamus to that court. The county court return to those writs, as the reason for their refusal to allow the accounts of the said judges and order the same to be paid out of the county treasury :

1. That the act leaves the amount of additional compensation, to be paid to the judges, to the discretion of the county court, and the county court have not determined, in the exercise of that discretion, what amount, if any, shall be paid to them.

2. "That the act, so far as it requires money to be paid to the said judges, out of the county treasury, is unjust, oppressive and void ; is repugnant to our system of government and unconstitutional, and, therefore, the payment of any money out of the county treasury to the said judges, under the said act, would be a misapplication of the county treasure, entrusted, by law, to the administration of the court."

An application is now made for a writ of peremptory mandamus, on the ground that the cause shown by the county court is not sufficient to warrant the refusal to allow the accounts.

As the first reason assigned by the county court depends on the proper construction of the act of the 3rd of March, 1851, it is proper to set it out. It is in these words :

"An act to increase the salaries of Judges in St. Louis county.

Be it enacted by the General Assembly of the State of Missouri :

"§ 1. That the county court of St. Louis county, is hereby authorized and required to pay out of the county treasury of St. Louis county, to the judge of the St. Louis circuit court, the judge of the St. Louis court of common pleas and the judge of the St. Louis criminal court, each, such sum in addition to the amount now allowed to such judge by law, as will make the total amount of compensation received by said judge, not to exceed the sum of three thousand dollars.

[* 21] * "§ 2. The additional compensation herein provided for, shall be paid at the same stated periods, as the salary of said judges respectively are now paid by law.

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“§ 3. This act to take effect from and after the first day of August next.

Approved March 3, 1851.”

In order to the correct understanding of the phraseology of the act, it is necessary to state the provisions of previous laws, allowing the judges compensation. They have always received the same salary, from the State treasury, that has been allowed by law to the judges of the circuit courts throughout the State, to-wit: one thousand dollars. In addition to this salary there were fees allowed each of the judges, of fifty cents for each judgment in a case, coming by appeal, from a justice of the peace, and one dollar for a final judgment in all other cases; but the fees received were never to exceed one thousand dollars per annum, and any excess of fees over that sum, was to be paid into the county treasury.

The act of the 3rd of March is passed with the knowledge of the different sources from which the compensation of those judges had been previously derived, and its design is to increase that compensation. The additional compensation is to be paid, as the second section declares, at the same stated periods at which their salaries are, by law, to be paid. As the part of their compensation by fees, is still retained, and as the amount so to be received, is an unascertained and varying amount, it is impossible to fix the amount of the additional compensation designed to be given by this act. There are three different portions of the compensation to be received; the salary from the State, the fees from suitors, and the money to be paid by the county, and the whole compensation is not to exceed \$3000. The former maximum was \$2000, of which \$1000 was the salary, and the balance fees, not to exceed \$1000. Now the maximum is raised to \$3000. The county court regard the use of the words “not to exceed,” as designed to restrain them from making too large an allowance to the judges, and leaving it to their discretion to make the additional compensation as small as they think proper.

We do not think this a fair or reasonable interpretation of the act. In its whole scope it shows a plain intention to give a substantial

and certain increase to the compensation of these officers. It so speaks in the title ; its enactment is in the language of command, while the construction put upon the language reduces it to a bare permission to the county court, to pay such sum as [* 22] they think proper. We suppose the *words "not to exceed the sum of three thousand dollars, were employed to meet such a case as this. The county court having an account before it for \$500, for one quarter, and evidence that no fees have been received, is required, by the law, to cause it to be paid, and so for another quarter, with the same evidence ; but, if at the third quarter the fees received amount to the whole \$500, they are not required to pay any additional sum ; or, if the fees exceed the \$500, they are authorized to carry the excess into the next quarter, and pay only the balance of such quarter, so as that the whole compensation received shall not exceed three thousand dollars. The act is awkwardly phrased, but we think the intention of the legislature is sufficiently plain, and that the intention does not vest the county court with the discretion they claim.

The second cause assigned by the county court is, that the act is unconstitutional. We say this is the sum of the language in the return, for in the consideration of the case, we have found no power vested in this or any other court to remedy injustice and oppression in a legislative act, except where, in the attempted injustice or oppression, some constitutional provision is violated.

The argument in support of this part of the return, places the unconstitutionality of the act upon its alleged repugnance to the 19th section of the 13th article of the constitution, which declares, that "all property subject to taxation in this State, shall be taxed in proportion to its value," and to the 7th section of the same article, which declares, "that no private property ought to be taken for public use without just compensation."

In considering the question thus presented, the suggestions made at the bar, that this act was passed upon the petition and urgent solicitude of many of the citizens of the county, and received the unanimous support of the representatives of the county, can have no weight, for the reason, that the General Assembly can derive no power from a petition, and the constitution-

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ality of the act is in no degree affected by the fact that any given portion of the Assembly supported or opposed it.

We have been asked, in examining the question now before us, to consider the constitution as an instrument adopted by a community, previously organized, already familiar with the principles of free government, and not a mere aggregation of individuals who were before in a state of nature, without political or civil institutions. We are asked to regard the constitution in this light, in order to find a rule of interpretation that shall limit the grant of legislative power to the General Assembly, beyond the extent of the limitations contained in that part of *the [* 23] constitution, familiarly termed the "Bill of Rights."

It is expressly disclaimed in argument, that there is any law higher than the constitution, and this resort to the history of the community, is simply to find a rule for the interpretation of the instrument.

If there be in the constitution any language of doubtful import, we must, of course, look to the circumstances and condition of the people, and to the history of the instrument itself, to find the meaning of the clause in question; but where the language is plain and intelligible, and consistent with all other parts of the instrument, we cannot allow ourselves to find, in any reference to facts, out of the instrument, any authority for interpolating either a grant of power or a restriction upon power granted. (a)

Nor is there any necessity for such reference, in order to reduce the general grants of power within limits in which they may be exercised with safety to the community and individuals. The declaration of rights which furnishes limitations upon the powers to be exercised by all departments of the government, is a comprehensive declaration of the great principles upon which rest our political, civil and religious freedom, and our social and individual security. The invasion of these principles, by any functionary of any department of the government, is as much a violation of the constitution as if they were written out in the form of the most imperative prohibition. Yet, where all this is stated, it still

(a) Murphy and Glover, Test oath cases, 41 Mo. 373.

remains true, that no court is authorized to declare an act of the legislature void without being able to point out some specific clause of the constitution to which it is repugnant.

Within the limits thus allowed for the action of the different departments of the government, much injustice may be practiced and much wrong done, for which there is no remedy. The highest and purest court that ever sat on the earth, may render a judgment erroneous in its principles and ruinous in its consequences, and yet there is no remedy. The chief executive magistrate may appoint to an office of high trust, a man entirely unworthy to fill it, and there is no remedy. The legislature may from mistaken views of policy, pass a law greatly injurious to the best interests of the State, or a law, oppressive in its operation on one class of citizens, and yet there may be no remedy provided by the constitution, while the law continues on the statute book. The power, to be sufficient for good, must, of necessity, be capable of producing much evil, even when exercised within the acknowledged scope of the grant. It may therefore be stated, as a principle, in construing the constitution, that the mere fact, that a law is unjust in its operation, or even in the principles upon

[*24] which it was adopted, does *not authorize any expansion of the prohibitions in the constitution, beyond their natural and original meaning, in order to remedy the evil in the particular case.

When we turn now to the consideration of the act in question, its injustice is apparent, upon its own face. The citizens of a county who have been required to pay their proportion of all the expenses of administering the law throughout the whole State, are required, in addition, to pay the largest part of the expense of administering the same law in their own county. The wrong done to the county is palpable, but with this admitted, the constitutionality still remains untouched.

When the 19th section of the declaration of rights is invoked, to protect the county against this act, it is necessary to enquire into the meaning of the declaration "that all property, subject to taxation in this State, shall be taxed in proportion to its value." The clause is evidently mandatory upon the General Assembly,

when exercising the taxing power, and furnishes a rule which is not to be departed from. What property shall be subjected to taxation is left to their discretion, but when they have selected the subjects, the rule for assessing the tax, is, in proportion to the value of the property. It is not necessary in this case to decide, whether a different rate of taxation can be imposed upon different descriptions of property, all being taxed by an *ad valorem* tax. The idea of equality in taxation, is certainly not the prominent idea conveyed by this clause; nor can we suppose that it was designed to be conveyed, when we consider that so many constitutions of other States previously adopted, contain clauses expressly enjoining equality in taxation, and when the insertion of a word or two in the clause would have expressed the idea clearly. It may be further observed, that if equality in taxation is required by this section, then the provision in the first section of the tenth article, that the lands of non-residents shall never be taxed higher than the lands of our citizens, is entirely superfluous.

We might dismiss this point without further consideration, for the return of the county court does not state, that in order to pay the judges the additional compensation demanded, there will be any necessity for increased taxation upon the citizens of the county. The county treasury receives money from fines, forfeited recognizances and other sources besides taxes, and we cannot judicially know, that the other funds in the treasury are not sufficient to meet this expenditure without taxation. But it is not the wish of the court to avoid deciding the case upon principles that will settle the controversy; and it will therefore be assumed, that in order to meet this additional demand upon the county treasury, *it will be necessary to increase the county [* 25] tax. Does this fact establish a repugnancy between the act and the constitution? Does it disturb the rule that requires property to be taxed in proportion to its value? Each county court is authorized by law, after the assessment of the property in the county is made, and the tax books are corrected and adjusted according to law, to ascertain the sum necessary to be raised for defraying the expenses of the county and to levy such sum by a

tax upon all property and licenses made taxable by law for State purposes, so that the county tax shall not exceed the State tax on the same subject, more than one hundred per cent. This provision of the statute obviously contemplates a different rate of taxation in different counties, for defraying county expenses; and if the constitution requires that every citizen of the State shall, upon all his property, be taxed for county and State purposes, at precisely the same rate, then this power, as it has always been exercised, has been repugnant to the constitution. In different counties, the rate of taxation for county purposes, has always differed very materially, as the expenses of county buildings, roads, bridges, expenses in criminal prosecutions and other county expenses have varied. We learn, that in the populous and wealthy county of Howard, where all the county buildings and other improvements are completed and paid for, there is sometimes no county tax levied. In some of the other counties, the maximum allowed to be levied by the law is imposed. Upon the supposition that the constitution imperatively requires equality, either the citizens of Howard must be taxed at the highest rate allowed by law, although they would have no use for the money in the county treasury, or there should be no county tax imposed in other counties whenever one county, such as Howard, has no county tax levied. If the constitution requires equality in State and county taxation, then, instead of leaving the subject to the discretion or judgment of county courts, the General Assembly must fix one uniform rate of county taxation without regard to the different wants of the different counties. It is not believed that the constitution admits of an interpretation that would produce such results. It is not doubted that the rule of taxation adopted for State and county taxation is the rule required by the constitution. The property is assessed at its value, and upon that value the same rate of taxation is laid throughout the State, for State purposes, and the several county courts, taking the same valuation, levy such per cent. for tax as the expenses of the county require.

But, it is said, the General Assembly cannot pass an act by which a burden, that ought to be borne by the State
[* 26] treasury, shall be cast upon *the county treasury, and

thus the county taxation be increased. The question we are now considering is, whether an act that increases the county tax in one county, is repugnant to the constitutional provision that requires all property to be taxed in proportion to its value. The question whether the General Assembly has the constitutional power to pass an act that will have this effect, does not in any degree depend upon the considerations or motives that produce the passage of the act. The objection to the law is, the effect on county taxation. Now the same effect would be produced by a law which required the county of St. Louis to expend an equal amount of money upon roads, public buildings, the pay of jurors or other matters of county interest, which the General Assembly might judge to be properly a burden upon the county treasury, and such law would, upon the point now in discussion, be as liable to the objection of violating the constitution as the act now under consideration.

All county expenses, for which a tax is to be levied, or of which the county court is authorized to make payment, are either expressly created or are authorized by law. The peculiar position and circumstances of any county may require, in the judgment of the General Assembly, the expenditure of money for the accomplishment of an object of the highest interest to its inhabitants, and exclusively local in its character and benefits, but there may be no law authorizing the expenditure. It is not doubted that the General Assembly have the constitutional power to direct the authorities of the county to cause the work to be done, and payment to be made out of the county treasury. The practice prevails, to some extent, of directing votes of the people to be taken in different localities, upon questions relating to expensive undertaking, that will be burdens upon the people in that locality, and authorizing debts to be contracted or taxes to be imposed, as the popular vote may determine. It is not believed that a tax thus imposed upon the property of a citizen is in any degree more constitutional than if imposed directly by the General Assembly. The General Assembly must be regarded as charged with the duty of promoting, by proper enactments, the interests of the whole and of each portion of the community, and authorized to impose the

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burdens, arising from local works or services, upon the inhabitants of the locality benefitted. When, in the exercise of their judgment, they determine that the benefit is so exclusively local as to require that the expense shall be borne by the treasury of a county, rather than by the State treasury, the clause of the constitution, requiring property to be taxed in proportion to its value, is not violated. We cannot revise their judgment, in such [* 27] case, under this clause of the *constitution and declare their acts inoperative. In relation, then, to the act now in question, it is the opinion of the court, that it is not repugnant to the 19th section of the Declaration of Rights.(a)

We proceed then to the second objection, which is, that the act is repugnant to the clause in the 7th section of the Declaration of Rights, which says, that "private property ought not to be taken for public use, without just compensation."

This is a limitation upon the right of eminent domain, which is inherent in every sovereignty, and under which the rights and interests of each individual citizen must yield to the necessities of the State. Here is the limitation of the right, not that the rights and interests of the citizens shall be preserved against the demands of the community, but that he shall have compensation for his property that may be taken.

It is exceedingly difficult to comprehend the argument that is designed to show a repugnance between the act in question and this clause of the constitution. It appears to assume that the county treasury is the depository of the voluntary donations of the citizens, made for specific and declared uses, and that this act is an attempt to confiscate the money thus collected, and apply it to the uses of the State. This is altogether an incorrect view of the character of the fund held in the county treasury and of the operation of this act.

The assessors of the county are required by law to return their books of assessments to the county court on or before the 1st day of June in each year. Revised Code 934 sec. 34. Thirty days

(a) *State v. North*, 27 Mo. 464; *Egyptian Levee Co. v. Hardin*, *Id.* 495; *Col. Bottom Levee Co. v. Meier*, 39 Mo. 53.

after the return of the tax books, a court of appeals is required to be held, to hear appeals from the assessment, and then the tax books are to be corrected and adjusted. After this is all done, the county court ascertains the sum necessary to be raised for county expenses, and levies the county tax: Rev. Code 946 sec. 2. The act now under consideration, was passed on the 3rd of March, 1837, and took effect on the 1st day of August thereafter. Now if the county court has taken the expenses required by this act, into their estimation of the sum necessary to be raised for county purposes, then the money demanded by the judges is actually in the county treasury, for the very purpose of paying their claim. And so in the future operation of the law, if the county court, in ascertaining the amount to be raised, take this additional compensation of the judges into their estimate, the money to meet the demand will, by the operation of other laws, always be in the treasury to answer the demand. So this act does not propose to seize the funds of the county, paid by the citizens for their own benefit into the county treasury, and appropriate them to a different public use, but authorizes *and requires the payment of money out of the very [* 28] fund in the treasury to satisfy this demand.

It is the opinion of the court, that the act in question is not repugnant to that clause of the 7th sec. of the declaration of rights which asserts that "private property ought not to be taken for public use without just compensation."

We have examined the two clauses to which this act is supposed to be repugnant. We find no repugnance to either. If in listening to the voice of the people, speaking through the constitution, we had found one utterance prohibiting the passage of this act, we would cheerfully have rendered that prohibition effectual, but we are not at liberty to give our judgment of expediency, or even of justice, a controlling power over acts of the General Assembly. Our duty, then, alone remains for us to perform, and that is to enforce the law. Let the peremptory mandamus issue. (a)

(a) Wells v. City of Weston, 22 Mo. 384; Stewart v. Griffith, 33 Mo. 13; State v. St. Louis Co., 34 Mo. 546; State v. Valle, 41 Mo. 29.

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THE STATE OF MISSOURI v. ROBERTS *alias* WARD.(a)

15 Mo. 28.

1. *Evidence*.—Defendant was indicted for the murder of one Hibler, a police officer, who was attempting to arrest him without a warrant. *Held*, that evidence was admissible to show that deceased was a police officer, and that defendant was in the act of violating a city ordinance, though neither of these matters was averred in the indictment.
2. *Dying Declarations*.—In a trial on an indictment for murder, the dying declarations of the deceased are admissible in evidence, if made in the prospect of immediate death, and when he entertained no hope of recovery.
3. *Witness*.—When two persons are jointly indicted, neither is admissible as a witness for his co-defendant, whether they are tried jointly or separately.(b)

LACKLAND, for the State.

BROWN, *contra*.

[* 36] *RYLAND, J., delivered the opinion of the court.

The defendant was indicted together with Richard Jones for the murder of Ephraim Hibler, in the city of St. Louis, in May, 1850.

There was evidence showing that Hibler was a policeman, one of the night watch of the city; that he attempted to arrest the defendant, and was by him killed, by a pistol shot, during the attempt to arrest.

The defendant, John Roberts alias John Ward, was found guilty of murder in the first degree; he appealed to this court, and the judgment of the criminal court was reversed and the cause remanded.

It appeared by the record of the first trial, that Roberts had been arrested and put in the calaboose; that on his own application and promise to leave the city, he was discharged, upon the condition that he would leave the city within a short time, say a day or two. That Roberts was seen in the city after the time had elapsed; that the city Marshal gave orders to Hibler to arrest

(a) See same case, 14 Mo. 138.

(b) Gen'l Stat. of 1865, chap. 213, § 24. Wagner's Stat. p. 1104.

Roberts, and that in attempting to execute said order Hibler was killed.

When the case was first before this court, although there was testimony, showing the manner of the killing to be with [no] such deliberation, that a jury might have thought it was malice, that the act of killing was indicative of a "heart desperately wicked and fatally bent on mischief," yet, we were inclined to suppose, that justice might require the attention of the jury to be called by proper instructions, to the fact of the reason or cause of the arrest. That if they should think, that the cause of the order for arrest, was merely the breach of the promise made by Roberts to leave the city in a few days, that such breach of promise, alone, did not furnish a sufficient cause for the order for his arrest; that the arrest, if on that ground alone, was illegal; and if the killing was not with so much deliberation as to make it murder, even if the arrest was illegal, that then the jury should not find the defendant guilty of murder in the first degree.

The case was again tried, and a jury again found the defendant guilty of murder in the first degree. He moved for a new trial; also, in arrest of judgment—both motions were overruled and he again appealed to this court.

The bill of exceptions sets forth the following evidence:

CITY ORDINANCE, 1850, PAGE 407.

SECTION 1. "All able bodied persons, who, not having visible means to maintain themselves, live idly, without employment, or are found loitering or rambling about, or wandering abroad, and lodging in groceries, *tippling houses, beer [* 37] houses, out-houses, bawdy houses and houses of bad repute, sheds or stables, or in the open air, or who shall be found trespassing in the night time upon the private premises of others, and not giving 'a good account of themselves, or wandering abroad and begging, or going about from door to door begging, or placing themselves in the streets or other thoroughfares, or in public places to beg or receive alms, all keepers or exhibitors of any gaming table or device, all persons who for the purpose of gaming travel about or remain in

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steamboats or go from place to place, and all persons upon whom shall be found any instrument or thing used for the commission of burglary or for picking locks or pockets, and who cannot give a good account of their possession of the same, shall be deemed vagrants.

SEC. 2. On the trial of any person before the recorder, charged with being a vagrant, it shall be lawful for the city to introduce, in support of said charge, testimony of the general character and reputation of the defendant, touching the offence or charge set forth in the complaint, and the defendant may likewise resort to testimony of a like nature, for the purpose of disproving said charge, and if the defendant, after all the proofs shall have been heard, be found guilty, he or she shall be assessed to pay a fine of not less than fifty dollars nor more than five hundred dollars, and the recorder shall enter judgment for such fine and costs, and shall moreover require the defendant to give a bond to the city of St. Louis, with two or more good and sufficient securities, in a penalty not less than five hundred dollars and not exceeding one thousand dollars, conditioned that if the said defendant will, for the space of six months next ensuing the execution of said bond, be of good behavior, and in default thereof, it shall be the duty of the recorder to commit said defendant to the work-house until such security is given, not exceeding six months. Approved March 29th, 1850.

ORDINANCE ESTABLISHING AND REGULATING THE POLICE DEPARTMENT.

SEC. 1. There shall be established a police department to consist of the city Marshal and the officers and privates of the day and night guard.

SEC. 3. The night guard shall consist of one Captain, three Lieutenants, thirty-six privates, and such temporary guards as may be employed as hereinafter provided.

SEC. 4. The city Marshal, *ex officio* shall be chief of the city police, and all the officers and privates composing the police department shall be in subordination to the city Marshal except in the cases otherwise provided in this ordinance.

*SEC. 8. The chief of the police (in subordination to the Mayor) shall be authorized, whenever, in his opinion, the public service may require it, to take command in person of all the members of the day and night guard, and direct their movements in the discharge of their respective duties, under the regulations of the police department of the city. He may, whenever in his opinion the public service requires it, detail any number of the day or night guard for any special or particular duty connected with the police service of the city, and he may, in cases of emergency, require any number of the day or night guard to do duty at any time of the day or night. * [38]

SEC. 12. It shall be the duty of the privates to be punctual at roll call at the second station house, to obey punctually and to the best of their ability, the orders of the chief of the police, the Captain of the city guard and the Lieutenants to whose command they may be severally assigned, to remain on their respective beats and not leave the same, except in the discharge of their respective duties. They shall, to the best of their ability preserve order, peace and quiet throughout the city, they shall arrest persons found in the act of violating any law or ordinance, they shall arrest all persons found under suspicious circumstances, and who cannot give a good account of themselves, and convey all persons so arrested to the station house of the district in which any such arrest is made, and report to the Lieutenant of such district the cause of such arrest, the names of the witnesses and all the facts connected therewith. The members of the city guard shall have authority to enter any house, enclosure or other place, where a breach of the peace, or crimes, or breach of ordinance has been or is being committed, and arrest the offender or offenders, but shall not enter any dram-shop, bawdy house or other place except in the discharge of their duty. They shall cry the hour of night, give the alarm of fire, and report all nuisances within their respective beats to the Lieutenant of the district in which said nuisances are found, and attend at their respective station houses at the hour of dismissal, and then be discharged from duty." "Approved April 1st, 1850." Which said ordinance first mentioned, and sections of the ordinance last mentioned, read in evidence,

were admitted by defendant's counsel to be genuine ordinances, passed by the city council of St. Louis in pursuance of the city charter, and in existence and in force at the time this killing took place.

Among other evidence adduced in the case was the following :

DR. THOS. McMARTIN, witness for the State.—I am a surgeon and knew Ephraim Hibler and attended him in his last illness. I was called on to visit him about one year ago, about 12 [* 39] o'clock at night, at a *house on the corner of Second and Almond streets. He was laboring under the effects of a pistol wound, the shot having struck one of his false ribs, and passed through a portion of spleen and cut the bowels in several places, and the passage was lost. His wound was dressed with sticking plaster, which I removed and prescribed some medicine for him. The next time I saw him was at his own house, near Chouteau Avenue, in this city, and continued to visit him until his decease; after his death I conducted a post mortem examination, and found that the ball had passed twice through his bowels; there had been excessive hemorrhage and considerable inflammation; first saw him at northwest corner of Second and Almond streets, at a drinking house. We did not find the ball, only traced it through the intestines. It had entered on the left side, about two inches above the vest, and passed anterior towards the spine and nearly in a horizontal direction, but might have been a little up or a little down. The hole made was about the size of a little finger; the wound was necessarily fatal; do not remember whether any one told him he would die or not; do not think any person had any idea of his living; I have no doubt he died of the wound; he died in St. Louis county, May, 1850.

CROSS-EXAMINED.—Saw Hibler, five or six hours before his death; mortification had at that time partially commenced; he suffered a great deal of pain. Dr. Beaumont also attended deceased. There was no external hemorrhage, the wound had been caused by a small projectile. It was some three or four days from the time I first saw him that he died, which was not far from 12 o'clock; did not see the prisoner at that time. Deceased had been struck by but one ball; the post mortem examination was made

by introducing cathetar, and by cutting ; we traced the ball some four inches ; a ball passing through the intestines is necessarily fatal.

RE-EXAMINED.—I think that the deceased did not expect to recover, from the first time I saw him.

DR. BEAUMONT, for the State.—I knew a man called Ephraim Hibler, and saw him after he had been wounded ; only saw him once, and that was on the evening of the 25th of May ; the wound had ranged laterally and could force my little finger into it. I attended at the post mortem examination, and found that the wound was of necessity a fatal one ; post mortem examination was made on the 27th of May ; wound was on the left side, and the ball struck and grazed the stomach ; passed through the spleen, and allowed its contents to escape into the abdomen, and glanced into the intestines on the right side, and cut the intestines in several places ; he died of the wound. (No cross-examination.)

JAMES A. FELPS, for the State.—I am Marshal of, [40] the city of St. Louis and have served in that capacity for two years ; and am chief of police by virtue of my office, and held this office at the time of this killing. I knew Hibler ; he was a member of the night guard of the city of St. Louis at the time of his decease ; knew Jack Roberts, and recollect the night Hibler was killed. Roberts had been confined in the calaboose for two or three days, some week or ten days before that time ; he was discharged on a promise that he would leave the city ; he had been arrested on a charge of vagrancy ; the proposition to leave the city, first came from Dick Jones ; he was to have left the city in a short time, and that was the distinct understanding, not exceeding 24 hours. Several days after, heard that he was still in the city, and gave a general order to the police to arrest him. I wanted him arrested to be tried upon the old charge of vagrancy, and the order was to arrest him to be tried. Hibler came and asked if he should arrest Roberts, and I told him he should, if he remained in the city after a stipulated time ; that he was a bad man and a thief. I saw Hibler at his own house, the day after he was shot ; he (Hibler) said he was badly wounded ; I tried to impress him with a hope of recov-

ery, but he said he had none. When I arrived he had just signed and made his will, and said he must die ; I conversed with him, with a view of getting his statement, to be used as testimony on the trial, but did not tell Hibler that that was my design ; did not propose to reduce the conversation to writing, and did not do it. Several persons were in the room ; we conversed in a low tone ; his (H.'s) wife was standing nearest to us ; the conversation was conducted by question and answer. When I left him, he bid me farewell, and I never saw him again while alive.

The State proposed to introduce the dying declarations of Hibler, which was objected to on the part of the defendant, and objection overruled ; to the overruling of which and the admission of the dying declarations, defendant excepted.

Hibler stated, that in obedience to my orders, he had attempted to arrest Roberts ; that a scuffle ensued ; that Roberts drew a pistol on him and snapped it ; that he took the pistol from him, and Jones then told him (Roberts) to feel in his other pocket ; that Roberts then drew the other pistol, reached round and shot him from behind, and inflicted the wound under which he then labored ; that this occurred at the Marengo coffee house ; that he (Hibler) was in good health at the time he was shot, and a stout able man.

The State here proposed to introduce testimony to establish the fact, that at and before the time of the attempted arrest, Roberts had been *guilty of acts constituting vagrancy ; to the introduction of which, on the part of the State, defendant objected, which objection was overruled and the defendant excepted.

I had seen defendant previous to his arrest ; he had not been long in the city ; never saw him do any work ; he (Roberts) is an able bodied person ; has seen him on Almond street, and at the house of Liz. Hollis, a house of bad repute, that is, a bawdy house ; has never seen him engaged in any pursuit, and knows of no property or visible means of support he has ; first saw him in this city about one year since. Hibler's beat was in the lower part of the city ; Almond street was

the dividing line, but am not now certain, whether his beat lay on the north or south side of Almond street. If a watchman is in pursuit of a person, he can follow and arrest him under the ordinance wherever he runs within the city limits. When I went down to see Hibler, I did not know what his condition was, and conversed with him with a view of collecting testimony. Watchmen had nothing at that time by which they could be designated but a club or staff. Don't recollect how long after his arrest it was that he saw Roberts. All this took place in St. Louis county in May 1850.

CROSS-EXAMINED.—Think I knew Roberts about one month previous to his arrest, and that my first acquaintance with him was at Liz. Hollis' house. I had him arrested first, because I heard he was walking about the Ferry. Police officer Cook, arrested him merely because he deemed him a vagrant, he (Roberts) was never tried on that charge. The first application for his release came from Jones, who is the friend of Roberts; he was released on consent of Recorder Dougherty and City Attorney Anderson, provided he would leave the city within a given time. When he was first arrested there was a pistol taken from him; don't remember who was present when he was discharged, nor whether I returned him fifty cents or any money; think the time he was to leave the city was within 24 hours. At the time of his discharge I ordered the police to arrest him, if found in the city after the stipulated time; the order was verbal. I also instructed Hibler to arrest him if he was found in the city after the stipulated time; think I assigned a reason, at the time, for the arrest, but am not certain; don't recollect what that reason was. I did not see Ward from the time of his discharge to the time of killing Hibler; recollected of no new charges being preferred against him during the interval, and there was no new evidence of his being a vagrant. I knew of no specific charges against Roberts, of my own knowledge, except the charge of vagrancy, under which he was arrested. Hibler asked me if he should arrest Roberts, if he came across *him; said he had seen him [*42] on his beat. H.'s beat was on the south of Almond street; at any rate Almond street was the dividing line

between the beats; there is no power that I know of for watchmen to serve written warrant, and there was none issued; have known of warrants being issued in Recorder Hyde's practice; he went out of office on the 2nd Monday in April, 1850. I know nothing about where Roberts was after the expiration of the time he was to leave the city; think a man can reform and cease to be a vagrant; don't recollect whether Roberts was charged with swindling a countryman, and know of no evidence to substantiate that charge. Persons are arrested under the vagrant act only, when no crime has really been committed except vagrancy; don't recollect that I even enquired as to Robert's visible means of livelihood; never made any attempt to find out whether he had any means of support; never asked him whether he had any money or property; don't remember of making any such enquiries, after his first discharge. I have occasionally taken the liberty of telling persons to leave the city after a given time; commonly threaten to arrest them if they do so; have done so before this; do not consult with the Recorder when I do so. Officers Page and Cook arrested Roberts the first time; they are salaried officers; after his first arrest he was detained in the calaboose 7 or 8 days before he was discharged, as near as I can recollect; I think he was reported to the Recorder after his first arrest; don't recollect of his having been brought up before the Recorder; did not apply for a continuance and cannot say whether the case was set on the docket or not; no order of court was made for his discharge, the reason he was discharged was the vast amount of business before the Recorder at that time, and his promise to leave if discharged; all policemen are bound to carry clubs, and only carry them when on duty, but the police generally go armed; generally carry pistols when on duty, but don't know whether Hibler was armed with a pistol on that occasion. I saw H. on the evening of the day following the one on which he was shot; only saw him once; don't recollect whether H. stated any thing about a warrant; my impression is that H. stated that Roberts would die before he would be arrested; don't remember the time of night it was, don't recollect any thing further in regard to that conversation.

RE-EXAMINED.—Roberts was confined in the calaboose not less than eight or ten days before he was discharged, and am certain that the time of probation had expired at the time of the attempted second arrest.

JNO. LAMBERT, for the State.—I was present at the time H. was shot; he was shot at the Marengo coffee house, on the corner of 2nd and *Almond streets; there are two [* 43] rooms down stairs in this house, and the counter was east and west in the front room. I was sitting in the door at Mr. Kincaster's on the east side of 2nd street, with Mr. Rose; saw Mr. Monastes, Hibler, Hahn and Allen come up, and then saw Hibler and Hahn run across the street in the Marengo coffee house; followed them across and entered the house by the door on Almond street, and passing through the bar room went into the back room in the western part of the house. I think I saw Hibler and Hahn in the back room, holding the defendant, who had his back against the western wall of the room; they held him and I saw a pistol in defendant's hands, holding it with both hands between his legs and refusing to go. (A large pistol here being shown to witness, he says it is the one defendant had between his legs.) Bill Cluxton went up to Roberts and asked him to give up the pistol, and at first he said he would, but made no motion to deliver it. Cluxton went into the bar room and defendant swore he would not go; then saw Dick Jones trying to open the back door; he was a long time at it, but finally opened the door and stepped out, and Hibler and Hahn pulled Roberts out into the middle of the room when he snapped a pistol at Hahn; Hahn then knocked him down with his police club, on a small bed that was in the bar room, after which Dick Jones jumped in and took hold of Hahn. The police then asked Monastes and myself for assistance; I assisted and caught Dick Jones and pulled him off of Hahn, which gave Jack Roberts a chance to get up. In the scuffle the pistol was taken from Roberts; after Roberts had got up, Jones came up to Roberts and asked him "where his other one was;" Roberts then said "I ain't got it." I pushed Jones back, who then put his hand in his own pocket and came up to Roberts and put his hand in his (Roberts') coat pocket, the left

one, then dropped Roberts' coat pocket and stepping back said to Roberts "feel in your pocket." I, Hahn and Hibler then pushed defendant into the bar room, where he got between the counter and the wall; the space between the two is about two or two and a half feet; after they got there I stepped into the middle of the room and Hibler again asked me to help him. Hibler told defendant that he knew that he (Hibler) was an officer and bound to do his duty, and to go along without resistance. I stepped up to defendant, who held the pistol in his pocket; as I stepped in front of him, defendant said "by God, I'll shoot," and then turned his hand, shot Hibler, and Hibler fell. Hibler was standing with his front or left side towards Roberts' left side; the left coat pocket of the defendant, the left hand and pistol being in the pocket and the right hand on outside grasping the muzzle of the pistol, and turned it slowly round to bear upon

[* 44] Hibler; *in turning the pistol he seemed to take his own time. (Another pistol here being shown, witness says it is the one afterwards taken from defendant.) Defendant then struck Hahn across the face with his pistol, and I then asked Hibler for his club, took the club off his arm, and struck defendant across the head with it, and knocked him down on his knees; then a scuffle ensued and Mr. Hahn knocked him about the same time; defendant then ran, and I saw Dave Monastes standing on the corner, and called to him to stop him, that he had killed Hibler; Monastes pursued and overtook him front of Rose's shop and knocked him down with his fist. Rose came up and struck defendant with a club some six or seven times after he was down, then picked him up by the top of the head and swore he would cut his throat; the officers then came and took the defendant to the calaboose. When I first saw defendant the officers were persuading him to go, and never saw them use any violence until he snapped the first pistol at Hahn in the back room, and then Hahn struck. While they were in the back room Jones went out and returned again; it was after Jones came in that they called on me to assist; did not see Liz. Hollis that night and she was not in the room; defendant took his own time in turning round to shoot; the minute after he shot, and had hardly got the words out of his

mouth before he shot. Hahn died of cholera. After Roberts shot, and after Roberts struck Hahn with the pistol, Hahn struck him, when Roberts ran forty or fifty yards down Second street; think Jones was in the bar room until Roberts shot; had not known Roberts except to see him go through the streets; not acquainted with him; had known him a month before; saw him at Liz. Hollis' house; know nothing about that house and only saw Jones there; Jones was a long time opening the back door; saw nothing in his hands; they are able bodied men; know of no business they follow, nor of any means of support they have. All this occurred in St. Louis county on the 25th day of May, 1850. The police who went into the coffee house came up Second street; Rose took the first pistol from Roberts in the back room; Roberts had a light colored coat on, like a sack, with straight pockets in the sides; Hibler held Roberts by the left coat collar when he shot him, and Hahn was standing against the wall to the defendant's right.

CROSS-EXAMINATION.—This occurred between 10 and 11 o'clock; Verdinal, Mr. Cozineau and Bill Cluxton were in the house; they were standing at the counter and Bill Cluxton was standing near the middle of the counter, the others behind the bar; don't recollect of seeing any one else there; did not see a boy by the name of Pifer; no one else was in the back room but the two officers, Roberts and Jones; Monasters and *Allen did [* 45] not go into the back room; heard no conversation in there; the officers held Roberts by the collar and shoulder and were speaking to him. Roberts said he would not go, he would die first; they pulled him into the centre of the room and then he snapped the pistol in the back room, but this is merely an opinion as to the centre of the room. Jones, when he went out, was not gone over a minute, and came back by the same way he went; he must have been working at the door some three minutes before he got it open; perhaps four or five minutes. Hibler had his club, but did not take notice what position he held it in; he was holding defendant against the wall; then I pulled Jones off, and Roberts rose to his feet; heard nothing said about a warrant, and if anything was said did not hear it, it might have been said; Cluxton then went back into the bar room; Cluxton went out twice;

I was standing about five feet from Hibler, in front of him, when he was shot; Hibler had his right side to the counter; when Roberts shot he held the pistol in both hands, and did not stretch it out, the officers were coaxing him to go along; Jones was standing at the central door. Hibler was a middle-sized man. I reside in the city and follow the river; never knew anything against Roberts, and saw him at the boxing saloon; I am going on the watch.

DAVID MONASTES, for the State.—Knew Hibler, and met him on the night in question, coming up the street; met with him between Almond and Poplar streets, along with Hahn, and we started up the street together. We stopped on the corner, and Hibler told us to hold on, and went over to the Marengo coffee house on the north-west corner of Almond and Second streets; Hahn followed him; Lambert and Rose were sitting on north-east corner of Almond and Second streets; they went over and then we went over and saw defendant in there. I stood inside of the door and Hibler told Roberts that he must go along with him as he was going to take him to the calaboose, they then got into the corner next to the door, in the back room, and Roberts stood up in the corner. Hibler told defendant that he must go with him, and he (defendant) said he would be *damned* if he would—he would die first. Hibler was on one side of him and had hold of his arm, and Hahn was on the other; Roberts was standing bending over, and had something in his hand between his legs, the officer called on some persons to assist him and Bill Cluxton stepped up and asked defendant to give him up the pistol, then I went out of the back room and stood on the side walk some minutes, and heard noises, as if they were coming out with him; then ran into the house and saw Hibler lying by the counter. I then went out again, stood on the side [* 46] walk, and heard a voice hallooing **“catch him;”* I started after him and overtook him in a short distance; struck at him and missed him, then struck at him and knocked him down; by this time the rest came up, and they took him to the calaboose. At the time of the arrest, Hibler told defendant that he was an officer, and bound to do his duty; did not see

Jones have anything in his hand ; did not see any licks struck in the back room ; don't know whether I or Cluxton got the pistol from defendant ; struck defendant with my pistol when I knocked him down in the street ; knew defendant some time, and never saw him do any work ; never saw him follow any industrial pursuit ; saw him go into Liz. Hollis', a house of ill fame, a number of times. Defendant is an able-bodied man, and I know of no means of support he has ; Liz. Hollis' is a house of bad repute ; saw defendant go into the "Break of Day" coffee house, kept by Jack McDivit ; did not know when Hibler and Hahn went across the street what they went for ; think Roberts was just coming to the door ; saw Liz. Hollis on the side walk on the north side of Almond street ; Roberts was in the corner at the time Jones opened the door ; Hibler and Hahn's manner, in making the arrest, was very kind ; Hibler had his club and remained at the coffee house ; the large pistol is the first I saw on defendant ; have seen defendant frequently at Liz. Hollis', and about coffee or drinking houses, and know of no means of support he has.

CROSS-EXAMINATION.—Hahn followed Hibler across the street ; Lambert and Rose followed him, and I soon after ; all entered the house within a minute of each other ; Cluxton was standing against the counter ; I went immediately to the door between the two rooms. When I went to the door, Hibler, Hahn, Lambert, Ward and Jones were in the back room, and Bill Cluxton passed by me ; Roberts was standing next to the door when I first saw him, with an officer on each side, and stood there a few minutes ; heard some one call for assistance ; think it was Hibler ; then there was a struggle ; Roberts was resisting ; heard Cluxton say something to Roberts, but don't recollect what ; did not hear any reply to Cluxton from Roberts ; no light in the back room ; front room was lighted with gas, and light was a little out from the counter ; when I left, Cluxton was still in the back room. I did hear something said about a warrant when I was in the back room ; Roberts spoke about it, but don't know what was said ; don't recollect whether the officers made any reply ; believe one of the officers said he had received orders from the marshal to arrest him ; don't recollect when

this conversation occurred, but it was sometime when they were in the back room. Hahn had a club, but don't recollect the position in which he held it; he had one hand on Roberts; saw neither Hibler nor Hahn have a pistol; Jones [* 47] was fingering at the door just behind Roberts and the watchman; left Roberts in the back room and passed out on the street; don't know that Jones went out of the back door; did not see Jones in the bar room as I passed into the street. I stopped some place in the neighborhood; did not go back until Hibler was shot; there was a good deal of noise made; do not know whether it was in connection with the noise that the pistol was shot or not; did not see Liz. Hollis enter the house; don't recollect Roberts pulled into the middle of the floor, saw no blows; did not see a bed in the back room; saw Roberts lying partially down on his elbow. I was the first one who struck Roberts after Hibler was shot; so far as I know, did not strike him a second time. When the others came up, they struck defendant with clubs; saw no one catch him by the hair, and heard no one threaten to cut his throat. I was standing in the crowd while these blows were given; am a blacksmith; never saw the defendant committing any crime; was a member of the independent police, and have not since been on the police; Roberts was closely watched as a suspicious character, by the independent police; saw defendant at the jail, and don't know whether McDivit employed him to keep bar or not; saw defendant carrying a basket before his arrest.

WILLIAM CLUXTON, for the State.—I was present at the time Hibler was killed; went to the Marengo house to examine a \$5 bill to see if it was counterfeit; don't know whether Roberts and Jones were there before I got in or not. Before I got the detector I was called on for assistance by the watchmen; the watchmen had hold of him and were telling him to go, and he swore he would not go; Roberts' face was towards the back part of the room; they had hold of him and were telling him to go along, and he said he would not; Roberts held his hands before him, but don't know what he had in them. I went and asked him for the pistol, and told him he had better go down civil, and he said he would, then went into the bar room and heard murder called in

the back room and Jones spoke and told them not to kill the man. Jones was busy opening the door ; Roberts was rather to the front near the centre of the room ; don't recollect stating on the former trial that I heard a pistol snap. I went into the bar room, and the next time I saw defendant he was on the bed in close quarters with the watchman ; Hahn had hold of his collar and Hibler was before the defendant ; saw no more violence than was necessary ; picked Hibler up and put the fire out ; the fire from the pistol caught to Hibler's clothes ; did not see any arms in possession of the watchman.

CROSS-EXAMINED.—I went into the back room twice ; the two policemen, Roberts, Jones and Lambert were in there ; don't recollect that I *saw the police officers go into [* 48] the house, nor of seeing any one else come into it ; lived about half a square from the Marengo coffee house, and kept a coffee house ; had been in the M. house but a short time when I heard the call for assistance ; heard a kind of squabble and could see into the back room. It was Hahn who called for assistance ; Roberts did not speak to me until I spoke to him ; don't recollect of any remark he made but what I have mentioned ; did not offer to take the pistol, supposed the cry came from Roberts ; did not speak to him when I went back the second time ; did not hear him say any thing the second time ; made no attempt to get the pistol after speaking to him the first time. Roberts never said he would not give me the pistol ; did not see any pistol at all in the back room, think I did hear Roberts make a remark about a warrant ; did not see Jones do any thing more than open the back door ; did not assist to take defendant out of the back into the front room ; did not see the pistol ; the shot came from the direction of the defendant ; don't know whether Roberts shot the pistol or not ; there was a good deal of excitement prevalent about that time ; don't remember whether the back room was lighted or not.

ELIZABETH HOLLIS, *alias* ROYCE, for the State.—I live at 74 Almond street on the south side ; recollect the difficulty which resulted in Hibler's death ; had not known defendant a long time, not more than a month ; he came into my house with Jones and

others ; never knew of his having any business or means of support ; did not know much about defendant, but knew more about the others, he came to my house very often in the day as well as night time. I had a bar there ; never shut up till 12 or 1 o'clock ; never saw the defendant with any kind of men other than those who do nothing for a living. At that time I knew all of them ; never saw any burglarious instruments about them, but not so with gaming instruments ; never saw any gaming instrument about him except a pack of cards ; saw Hibler when he was shot and when he fell ; Roberts then ran and heard him halloo murder ; met Jones in the door, coming out of the back part of the house and going to the front not long before the shot. The watchman had hold of Roberts ; have seen Roberts at Sarah Chandler's, called the Robber's roost, a bawdy house, a very low house ; saw the men the evening before ; they had said they never would be taken by watchmen ; saw them at Sarah Chandler's in the forenoon ; saw them also when they were going to the Marengo house ; have seen Roberts with a pistol and slug shot too in my house ; Roberts and Jones were together when they passed my house ; showed me their weapons and said they would not be taken by any watchmen nor leave the city.

[* 49] *CROSS-EXAMINED.—They came to my house to get something to drink and to see the ladies ; saw defendant drink ; sometimes he paid and sometimes others paid ; did not see him have a great deal of money ; never saw him working ; could not describe his dress ; saw him with both kinds of company, good and bad. I was standing partly in the door of a house on Almond street that night, and had come from my own house ; Hibler was standing somewhere near the door on Second street, and fell into the house towards the counter ; Roberts was standing near the door ; there was a pretty large crowd there ; Cluxton and Monastes were standing at the door and I then went home and got rags and put on Hibler ; Roberts went out of the door on Almond street ; Jones passed into the bar room a minute or two before the pistol was shot ; heard nothing about a warrant ; do not recollect the time nor any exact words that were spoken ; do not know how long time it was from the time I saw them pass to the

Marengo house until the affray. My house is half a square above the Marengo house on Almond street; did not see, in going to the Marengo house, any person that I recognized; heard defendant halloo murder as he was running; the crowd were all running; saw one of them strike the watchman; think it was with his fist; saw the pistol-shot, it was on the left side; saw Roberts distinctly when he shot; he was standing up and Hibler had hold of his arm; don't know which arm it was; have not got a good memory and don't recollect things long passed; saw Jones with a pistol that night; don't know whether she saw Cluxton with it or not.

WM. ROSE, for the State.—Was present when H. was killed; was going down towards home on Second street, when I saw two men sitting on the door, Lambert and Allen; they stopped me and I sat there some fifteen minutes. Two watchmen stood on the other side of the street. and they ran over to the Marengo house and we followed them; went into the house and into the back room; saw there two watchmen, Hibler and Hahn, who wanted to arrest Roberts; Jones was standing in the door going into Almond street; the watchmen wanted to arrest Roberts, and said they had an order from the marshal, and Roberts said "by God, save my life I won't go." Jones got a bunch of keys and tried to open the back door, and the watchman gave him the best words to go along; it was hard work to get Roberts out, and they called on Monastes to help them, saying that he was a citizen and bound to do so. Monastes came up, passed me, and defendant snapped a pistol and Monastes *emigrated*. Jones got the door open, then ran up and struck Hahn with a pistol, and Roberts made an effort to get out, but they held him fast and drew him into another corner. Hahn told me in German, to help, help, *we need help, and then I stepped up and took the [* 50] large pistol from Roberts, put the pistol in my pocket. Hahn then told me to get the other pistol, and I ran at Jones and Jones snapped another pistol at me, turned round and went into the front room, and Roberts twisted behind the counter, and then said, let me alone or I will kill you, and then "boom;" and then I went up to Roberts and took him by the hair and pulled him by it on the floor. I had a watchman's club; Cluxton then stopped

Hahn and said that was not the way to treat a man ; then Roberts drew another pistol and held the pistol up, and I jumped in the room and Roberts stepped out the door on Second street, and then I went out after him and knocked him down on the other side of the street ; then I brought him to the calaboose ; saw Jones have a bunch of keys. Hibler told Roberts he had better go, he had an order from the marshal to take him ; did not see anybody try to hit him ; just held him by the hand ; did not hear Jones say any thing. Jones went up twice to Roberts ; don't recollect what Jones said about the pocket ; never knew defendant except he saw him pass on Second street ; only saw once or twice ; don't know of any work he did ; never saw him with any burglarious instruments about him.

CROSS-EXAMINED.—Roberts, Jones, Hibler and Hahn were in the room, and don't know whether I or Lambert came in first. There was no light hanging in the front room before the door that leads into the back room. They were standing on the north side of the door against the wall ; Jones came up to Roberts after he opened the door ; don't know whether Roberts had anything in his hand : I took the pistol out of his hand. Hibler called for help, called on Monastes. Heard nothing said about a warrant. Jones snapped a pistol and then ran out of the room ; did not see him after that. Jones struck Hahn with a pistol ; think this was the one ; Roberts cried "let me alone, let me alone." About three minutes after he went in the house till the shooting took place. It was between 11 and 12 when I first entered the house ; the officers did not say for what offence the arrest was to be made. Jones never came back after he first went ; saw Jones open the back door with keys ; he did not go out then, but tried to rescue Roberts from the officers. Did not see Cluxton in the back room ; did not hear Roberts ask them for the warrant. Roberts said "let me alone ; if you don't, I will kill you ;" saw the pistol in Roberts' hand when he shot ; he had hold of the pistol with one hand when he shot. When I first struck defendant I was inside of the house and had a club. Hahn and myself struck Roberts after he shot Hibler ; I also struck him outside of the house ; I first struck him outside of the house and struck him several times ;

Roberts did not get up again *and run, but took him right [* 51] away to the calaboose ; did not see any person knock him down after that ; did not see Liz. Hollis that night that I know of ; know Liz. Hollis : she keeps a bawdy house ; saw defendant with lewd girls ; saw him twice ; don't know the first time I saw him before this occurrence ; have lived in that neighborhood for six years, and people generally say Liz. Hollis keeps a whore house ; may have heard people say that she will lie ; have never been on the watch. I took the defendant to the calaboose that night ; the officer told me to do so. I did not see defendant that night before I went into the coffee house ; it was all still about the house when the officers entered ; saw the bunch of keys with which Jones opened the back door ; there was a lock on the back door ; I saw the lock.

JESSE L. PAGE, for the State.—I know the defendant ; am on the the police ; recollect the night on whic Hibler was shot ; had known defendant a month or two before this occurrence ; never saw him do any work ; have seen him about coffee and bawdy houses ; don't think I ever saw any gaming device on him ; have seen him sitting about and drinking in coffee houses. I arrested him the first time ; he had a pistol and some keys about him ; arrested him at Sarah Chandler's ; arrested him on a charge of vagrancy. I believe the small pistol is the one I found on him ; don't know what kind of keys they were, but think they were trunk keys ; don't know that he had more than one key ; don't know of his having any means of livelihood.

CROSS-EXAMINED.—Knew Roberts, I think, one or two months ; think I had seen him twice before the arrest ; think I saw him on Almond street ; never saw him in any other coffee house. I knew him about a month or six weeks before Hiblor was shot. It was about two weeks from the time I arrested him to the time Hibler was shot ; he was left in the calaboose one or two days ; I put him in on Sunday morning, and think he was turned out on Monday night ; don't think I saw him from the time he was released until he was re-arrested ; only saw him twice before his first arrest ; did not search his lodgings ; searched him and found money on him ; think he had a ten dollar bill and some change ; don't know

if any money was returned to him; think defendant was shown to the police and that they had orders to arrest him if he did not leave the city in a given time; did not have any warrant when I first arrested him, and did so on suspicion; did not know of his having done any particular unlawful act, and was not doing anything when I arrested him; he was arrested for vagrancy; did not make any inquiries as to how he supported himself; never heard any others speak of his support but police officers; don't know whether the pistol was returned to him or not.

[* 52] *PETER H. COOK, for the State.—Knew defendant slightly; was a day policeman at the time of Hibler's death; my first acquaintance with him was on Almond street; recollect Hibler's death; knew defendant for two or three months before that time; never saw him engaged in any employment; saw him at Liz. Hollis' several times, also at Sarah Chandler's. On one occasion I saw Jones, Ward, and several others on the levee; concealed myself and saw a countryman coming down who came to Jones; they had conversation together and the four went off together; they went into a coffee house; after that Mr. Felps gave orders to have them brought down.

CROSS-EXAMINED.—Don't know how long I had known defendant before the death of Hibler; I was present when he was searched; he had a pistol, some money and a bill which was pronounced bad; don't know whether the money was ever returned to him; could not state the denomination, but think it was a \$2 bill; got a key from him it was a travelling bag key; searched his lodging; he lodged at Jack McDivit's; found nothing but some clothing; never saw any gaming device about him; never saw him committing crime on the levee; had not been on the police a year at that time; am in the habit of looking on persons with suspicion, especially strangers: have seen him riding out with ladies from Liz. Hollis'; have kept Ward's company and drank with him.

JNO. B. COZINEAU, for the State—Recollect the night Hibler was killed; was present at the time; Roberts and Jones came into the Marengo coffee house, and asked for a drink; they drank, paid for it and went out; the watchman came, and they came back and went in the back room. I went in and saw Hibler have

hold of Roberts ; Hibler told him he wanted him to go with him ; Roberts said he had not the power to take him, that he would die before he would go. Roberts came into the middle of the room and tried to get away ; he then tried to shoot. I then came into the front room, got a match and returned and saw Roberts on the bed ; I then lighted the lamp in the back room, and then some person said don't kill him, and Ward tried to get away. Hibler then took him into the bar room, saying, "come on, come on ;" Roberts shot and Hibler fell ; saw Roberts' hand in his pocket and saw him shoot ; somebody struck at Roberts and hit me on the head.

CROSS-EXAMINED—Jones, Roberts, Hibler, Lambert and myself went into the bar-room ; saw the watchmen enter back room. Jones asked them to show a warrant, but they did not produce any ; did not see any person attempt to take the pistol from Roberts ; think I saw Cluxton in the back room once ; did not hear him say any thing ; the room was quite dark when they went in there ; saw Jones try to open the back *door [* 53] which was shut ; there was a key in the door : did not see Jones go out ; saw Jones when I went in there, but after I lit the gas did not see him any more ; did not see Jones strike any person, nor any person strike Roberts. When Roberts was on the bed some one said "don't kill him ;" don't know who it was ; saw Hibler and other officers take Roberts in the other room. At the time Roberts shot, Hibler was pulling him by the collar, saying, "come on, come ;" don't know if the other officer had hold of Hibler (Roberts, alias Ward), then. Roberts shot from his pocket ; I was standing on his right side when he shot ; sure it was from his left pocket ; saw the fire on his coat. Hibler was shot on the left side and was holding Roberts with his hand ; did not see Liz. Hollis there that night. Hibler was taken into the back room after he was wounded. I should have seen Liz. Hollis if she had have been in there. Hibler staid there all night ; saw no blood on Hahn's face before Roberts shot ; did not see Rose there that night ; think I should have seen him had he been in there ; did not see Dick Jones in the bar-room after he went out the back door ; one of the watchmen

put his hand on Roberts' arm ; Roberts told him to take it off ; he said he would not, Roberts said he had no authority to arrest him ; and asked him to show his papers ; Hibler said he had none, and Ward said he would die before he would go.

RE-EXAMINED—Staid at the house all night that Hibler was shot ; did not see Liz. Hollis there ; Hibler talked gently to Roberts, and pulled him gently ; saw Hibler when he fell.

G. D. VERDINAL, for the State—Saw Roberts and Hibler at the time of the arrest ; was in the house at the time ; saw Roberts run in the back room ; told the officer to let him go, that he had no warrant to arrest him ; said if you don't let me go I'll shoot ; saw Roberts as he held on to the bar ; heard the shot, said you have not got any order to arrest me ; saw Jno. Lambert and Rose there. Roberts came into my house, and as he put his foot on the step the watchman ran into the back room ; own the Marengo House ; there is a door leading into the yard ; no lock on the outer-door ; there is a lock and no key on the door leading into Almond street, no lock on the back door ; had no lock on it at that time ; did not know Hibler's beat ; know Liz. Hollis but did not see her that night ; she did not come into my house at that time ; saw watchman have a stick and that is all ; saw some people strike Roberts after he had shot Hibler ; I did'nt see Jones at all ; back door locked with a key always in it ; saw Monastes, heard call for help and Monastes ran.

The court gave the following instructions, asked for on the part of the State :

[* 54] * 1. If the jury believe that the deceased, Hibler, at the time of the killing was a policeman, by virtue of any ordinance of the city of St. Louis, passed in pursuance of the city charter, and that the defendant at the time Hibler arrested or attempted to arrest him was found in the city of St. Louis under suspicious circumstances, or was an able bodied person, not having visible means to maintain himself, lived idly, without employment, or was found loitering or rambling about or wandering abroad and lodging in groceries, tippling houses bawdy houses, and houses of bad repute, and that it was made the duty of said Hibler, as a policeman, by any such ordinance, to arrest such

persons, and that in pursuance of his duty, Hibler in the night time, while on duty arrested or attempted to arrest the defendant in the city of St. Louis, using no more force or violence than necessary to make the arrest, then said arrest or attempted arrest was lawful and valid, although Hibler may have had no written warrant; and if the jury find that under the circumstances the defendant resisted Hibler, knowing he was a policeman and killed him, as charged in the indictment, with intent to kill him, and that defendant did the deed in malice at the time the act took place, and also, that before the act took place the defendant intended to kill Hibler, this is murder in the first degree, and the jury ought so to find.

2. Passion in law signifies a heated state of the blood caused by a lawful provocation. If Hibler had authority to arrest defendant, and made the arrest in a proper and lawful manner, and did nothing to defendant but follow and arrest him, this is not a lawful provocation, and the jury cannot infer passion from such arrest.

3. If the defendant, at the time Hibler and others arrested or attempted to arrest him, was a vagrant within the meaning of any ordinance, passed by the city of St. Louis in pursuance of the city charter, and that James A. Felps was marshal and chief of the police of said city and that said Hibler was a watchman under any ordinance of said city and by virtue of his said office, Felps had the power to order Hibler to arrest the defendant because of his being a vagrant as defined by ordinance, and did so order, and that Hibler in obedience to such order as a policeman arrested or attempted to arrest defendant in a proper manner, using no more force than necessary to perform his duty, and defendant knew Hibler was a policeman, then said arrest or attempted arrest was valid, although done without written warrant, and does not amount to a lawful provocation and so the defendant cannot infer that the defendant was in a heat passion because of the arrest, which the court granted, to which the defendant excepted.

The following, also, were given, at the instance of the defendant:

[* 55] *4. If the jury believe from the evidence, that the arrest was made in pursuance of an order of the marshal of St. Louis, that the officers of the watch must arrest the defendant if they found him remaining in the city after the time within which ordered to leave, and for that reason alone, then the arrest was illegal, and they cannot convict of murder unless they are satisfied from the evidence that there was express malice in the case.

5. If the jury believe from the evidence, that the defendant, at the time of the arrest was not in the act of violating any city ordinance or law, and was not found under suspicious circumstances, and unable to give a good account of himself, then the arrest was illegal.

6. If the jury believe from the evidence, that the arrest was illegal, then the officer making the same must be regarded in the light of a private individual citizen making an arrest upon the defendant.

7. The jury are instructed, that homicide shall be deemed justifiable when committed in defence of one's person, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be immediate danger of such design being accomplished.

8. That the mere suspicion of vagrancy shall not alone justify an arrest without a warrant, unless the prisoner be in the act of vagrancy at the time, and that an arrest so made will be illegal.

The court on its own motion gave the following instructions :

9. Gentlemen of the jury: There is no situation in life so pregnant with responsibility as that of a juror, whose duty it is to pass upon the life or liberty of a human being; nothing so unpleasant and nothing oftentimes so difficult: you will not permit the social condition of the accused to bias your minds in coming to a conclusion. He is in all respects, entitled to a fair and impartial trial, and if after weighing all the testimony in the cause, you entertain a reasonable doubt as to the guilt of the accused, you ought in that case acquit the defendant.

10. If the jury are of the opinion that the *arrest* was made solely because the defendant had committed a breach of the promise with the city officers, in remaining in the city limits beyond a

stipulated time, then the arrest was illegal, and you will find the defendant guilty of manslaughter in the third degree, and assess the punishment to imprisonment in the Penitentiary for a term not less than two nor more than three years, or by a fine not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months.

The following were also asked by the defendant, [56] but were refused by the court:

1. If the jury believe from the evidence, that the arrest was an illegal arrest, and that the defendant in resisting the same had just cause to believe himself in danger of being killed, or in danger of receiving great bodily harm, and could not prevent the same by escape or otherwise, they must find the defendant "not guilty," unless they are convinced from the evidence that there was "malice" on the part of the defendant.

2. If the jury should be of the opinion that the arrest was made, solely because the defendant had committed a breach of the promise with the city officers, by remaining in the city limits beyond a stipulated time, the arrest was illegal.

3. If the jury believe that the arrest was illegal, and that the defendant committed the killing in resisting the arrest and because of the same, then they cannot convict of murder.

4. If the jury believe from the evidence that in resisting the arrest, the defendant first "retreated to the wall," and only shot when escape was cut off, and that the defendant had just cause to believe himself in danger of great bodily harm, and that he shot, not from malice, but to defend himself and to prevent the arrest from being effected, and shall also believe from the evidence that the arrest was illegal they are bound to acquit.

5. The words used in the statute law, defining the crime of murder, to-wit: "willful, deliberate, and premeditated killing," are used in the same sense and have the same meaning with the words "malicious killing," as used at common law: "Decs. Sup. Court."

6. If it shall appear to the jury "upon the trial of any person

indicted for murder or manslaughter, that the *alleged homicide* was committed under circumstances, or in a case where by any statute, or the *common* law, such homicide was justifiable, or excusable, the jury shall return a general verdict of not guilty: R. S.

7. That an illegal arrest, places the officers making it, upon the same footing with any other trespasser upon the person, and where great bodily harm may be reasonably feared, an illegal arrest may be lawfully resisted, even with a deadly instrument, where no means of escape are left.

8. The premeditated homicide is not necessarily malicious, but that the premeditation must also include a design of doing an illegal act.

9. If the jury believe from the evidence that the arrest was made in pursuance of the order of the marshal and that the order of the *marshal was given because he, the defendant, had not left the city within the stipulated time, then the arrest was illegal.

10. In determining upon the indictment that operated upon the police to arrest the defendant, Ward, at the time of the homicide, the jury shall consider the orders given to the police by the marshal, and if the jury believe from the evidence that the cause for the arrest was the breach of promise on the part of the defendant, to leave the city within any given time, then the attempt to arrest was illegal, the police officer attempting the arrest was a trespasser, and the killing, if done in resisting, or under the provocation of such arrest was not murder.

11. If the jury believe from the evidence, that the attempt to arrest defendant, was on a charge of violating some law or ordinance of the city of St Louis, not amounting to felony, then in order to justify such attempted arrest of defendant, Ward must at the time thereof have been found "*in the act of violating*" such law or ordinance, and if defendant Ward, at the time of such attempted arrest was not in the act of violating such law or ordinance, such attempted arrest was illegal, and the killing of such officer in resisting such arrest, and under the provocation thereof, was not murder.

12. If the jury believe from the evidence, that defendant Ward

was arrested by officer Hibler on a charge of a violation of an ordinance of the city of St. Louis, entitled "An ordinance concerning vagrants," and that said Ward, at the time of such arrest, was not found in the commission of any act constituting vagrancy, then in that case such an arrest was illegal and the killing the officer in resisting and under the provocation thereof was not murder.

13. The order of a superior officer will not justify the making an illegal arrest, notwithstanding that it is the duty of policemen by ordinance to obey the commands of their superior officers.

14. If the jury believe from the evidence that the homicide was committed in resisting under the provocation of an illegal arrest, it is not murder, though the defendant at the time of doing the deed intended to kill Hibler, provided there is no evidence of express malice.

15. If the jury believe from the evidence that the arrest was made in pursuance of the order of the marshal, and that alone, then it cannot be justified by showing that the defendant was a vagrant at the time, but the legality of the arrest will depend on the legality of the order from the marshal.

16. If the jury believe from the evidence that there is a reasonable doubt of the guilt or innocence of the defendant, or if the jury, from the evidence, have a reasonable doubt as to any
[* 58] one point necessary to *establish the crime as charged in the indictment, then they ought to acquit the defendant.

In the former opinion of this court, it is stated plainly, "that the legality of the defendant's arrest was a material question in determining the character of the homicide.

That the breach of the promise to leave the city was no legal ground for his arrest.

It was, therefore, important to the State to prove that Hibler was a watchman, one of the police, and that Roberts was guilty of some violation of the city ordinances, or that he came within the description of the persons who might legally be arrested by the police.

To this it was proper to give evidence tending to show that he was at the time of the attempted arrest a vagrant, as declared by

the ordinances of the city. It was also necessary to prove Hibler to be a police officer. But it cannot be imagined, for these reasons, that it was necessary to aver in the indictment, that Hibler was a police officer, or that Roberts was a vagrant.

It is not similar to an indictment against a person for resisting an officer in the discharge of his duty. It is the character of the person resisted that partly infuses itself into the act of resistance and deepens its criminality. There, it is not the man, merely, but the officer, in his character as such, which the law has given to him, the resistance to whom is the offence. This official character must be averred—it makes a part or it is rather one of the ingredients of the offence.

It is not so in this case. The deliberate, willful, premeditated killing of Ephraim Hibler, had he not been an officer, would have been just as great a crime as if he had been the chief officer of the city.

It was also proper to prove that the arrest was ordered, not by reason of the breach of the promise "to leave the city," but because the defendant was one of those characters contemplated by the framers of the city ordinances, and provided against therein. To prove then that he was an able bodied person, idling about the streets, frequenting tippling houses, bawdy houses, and without any visible means of support, in short, to prove him such a character as the ordinance declares a vagrant, was proper.

There is nothing, therefore, in the acts of the court below, in relation to these points, that we find fault with.

The admission of the dying declarations of Hibler, after the foundation laid for them, as in this case, was proper and right.

We again repeat, that we do not consider a warrant necessary, in every case, before a policeman can arrest. Under [* 59] the various *ordinances of the city, arrests may be made without a warrant, in particular situations, or under peculiar circumstances. Vagrants, night walkers, and other suspicious characters, under the regulations of the city, may lawfully be arrested without a warrant.

To drive a policeman to the necessity of applying for and obtaining a warrant, in order to make an arrest in every case legal,

would be to take away the safe guard of property and life in our city, and expose the sleeping inhabitants, with all their property, to the burglar, the incendiary and the cut-throat.

There are many points, noted in the briefs of the counsel of the defendant, which were very ingeniously and ably argued, and I take pleasure in expressing my gratification at such professional ability as was displayed by the counsel for the State and for the defendant in this court. I shall briefly notice several of these points and pass on to the main question of this case, which is, I consider, the rejection of the co-defendant, Jones, as a witness, and is marked as the third point in the brief of the defendant's counsel.

The points about the giving and refusing instructions, and the motion for a new trial, on the ground of newly discovered evidence, and the motion in arrest, are passed over with the remark, that I have carefully examined them, and each of them, and feel unwilling to disturb the judgment of the court below thereon.

The instructions given in the case, in my opinion, place the law of the case plainly before the jury. The instructions refused were properly refused. We adhere to the former opinion, about the right to arrest at common law, and refer to it and the authorities therein cited. All the objections in relation to jurors and the want of examination of the prisoners before indictment, have been overruled; they have no intrinsic force in them.

I now come to the question about the competency of the co-defendant to testify. This question, as it now stands, merits our consideration. The case of *Garret v. The State* in 6 Mo. Rep. page 1, is the only case in which the point was expressly decided by this court. In that the opinion was written by Judge Tompkins, and bears upon its face hesitancy and doubt. "An accomplice *as it seems*, is a competent witness (2 Starkie 22) and may be examined if he be willing, &c." says the judge; that is, it has the appearance in law that the accomplice may be a witness. This opinion was afterwards somewhat reviewed by Judge Napton, in the case of *McMillen v. The State*, 13 Mo. Rep., and its force, as authority, much weakened. Indeed, the

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point is now in doubt, which way the authority prevails.
[* 60] As the law now stands, thus *doubtful, it will be necessary for us to turn our attention to this point, that hereafter the practice in our courts may be uniform.

In all probability, had the remarks of Judge Napton not been made in the case of *McMillen v. The State*, we should never have been called on to settle this question. It is generally of the utmost importance to have uniformity in the decisions of the courts of last resort. Whenever, then, a doubtful point has been ruled one way, it is better for its ruling to be looked to as the law, than to have it turned over and thrown in doubt. Decisions, in which principles have been misapplied or overthrown, should be corrected, and the sooner the better. This doubtless was the reason why Judge Napton touched the subject in *McMillen's* case.

In 2 Virginia cases page 317, the general court held, that it is a well settled rule of evidence, that a party, in the same suit or indictment, cannot be a witness for his co-defendant, until he has been first acquitted, or, in some cases convicted, whether the defendants be jointly or severally tried: 1 Hall 303, 306. This rule is evidence, as well by the earlier decisions of the English courts as by a more recent determination of Lord Ellenborough, in the case of *Rex v. Lafone* and others, 5 Esp. 155; and in the case of the *People v. Bill*, 10 Johnson's Rep. 95.

In the case of the *Commonwealth v. Lewis Marsh* and *Henry Barton*, 10 Pickering 57. These men were jointly indicted for forgery; the trial of one of them was continued; therefore he was called as a witness for his co-defendant and was by the court excluded as incompetent. Judge Wilde said, "it is an inflexible rule of evidence, that the parties of record, whether in civil or criminal prosecutions are not admissible as witnesses. They are not suffered to testify in their own favor, nor are they compellable to furnish evidence against themselves. This rule is not founded exclusively on the ground of interest but of public policy. The same rule is adopted in criminal prosecutions, even if the defendants are tried separately."

In 2 Camp. 334, in note, *Le Blanc*, justice, said, "the general rule was, that no person, who was a party to the record, was admissible as a witness."

In *Rex v. Locker, Wainwright and wife*, 5 Esp. Rep. 107 : In an indictment for a conspiracy, the wife of one defendant cannot be a witness for the other. Lord Ellenborough said, upon the proposition to introduce Mrs. Locker (Locker having gone through with his case) as a witness for the other defendants, Wainwright and wife, "he was clearly of the opinion, that she was inadmissible. A joint crime was suspected, in which the husband was implicated : and who would be *bene- [* 61] fitted by it? It was a clear rule of the laws of England, that a wife could not be called as an evidence for or against her husband, except in the excepted case of Lord Andley ; and whether her evidence was mediately or immediately to affect him, the legal objection was equally applicable."

In the case of the *State v. Smith*, 2 Iredell 405, Gaston, Judge, said : "It has been insisted in argument, that where a separate trial is had, the prisoner may have witnesses who cannot be admitted if he be tried jointly—for example, his co-defendants or their wives. But this is a mistake, whether the trials be separate or not, one of the several defendants indicted together, can not until he is finally discharged, be a witness for the others—and whenever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial."

In *Rex v. Lafone, Hopburn, Davis, Belleter and another*, 5 Esp. Rep. 154, Lord Ellenborough said : "In case of a joint indictment against several for a joint offence, I have never known this evidence offered, and I think it cannot be admitted. To allow this evidence, would go to every criminal case, for if two were indicted, one by suffering judgment by default, might protect the other. There is a community of guilt ; they are all engaged in an unlawful proceeding ; the offence is the offence of all, not the act of the individual only."

In the case of the *State v. Carr and others*, one of several was not admitted as a witness though no evidence was adduced to criminate him, 1 Cox N. J. Rep. 1. Where there is no evidence to inculcate a defendant, or where one was made a defendant by mistake, or where one was made a defendant for the express pur-

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pose of excluding his testimony, if nothing be proved against him, he may be admitted as a witness. Bull N. P. 285 ; Siderfin 441 ; Addison 352 ; Pennsylvania v. Leach. The practice in these cases, is, for the court to direct his acquittal, that he may be used as a witness. The People v. Bill, 10 John's Rep. 95. In this case the court said : "It appears to be a technical rule of evidence, and one well settled, that a party in the same suit or indictment cannot be a witness for his co-defendant, until he has first been acquitted, or, at least, convicted. Whether the defendants be tried jointly or separately does not vary the rule. It is being a party to the record that renders him incompetent, and the practice is, when nothing appears against one of the defendants, for the court to direct his immediate acquittal, that he may be used as a witness." 1 Hale's P. C. 306 ; Peake's Ev. 100, note ; 6 Term. Rep. 623.

As to the incompetency of the co-defendant, see also, [* 62] the People v. *Williams, 19 Wendell 377 ; State v. Mills, 2 Dev. 420 ; Rex v. Rowland, 5 Ry. and Mov. 401 ; 21 Eng. Com. L. Rep. 471 ; 1 Yerger, 531 ; Wharton's Crim. B. 210 ; State v. Calvin, 1 R. M. Chan. 151 to 169.

In the case of Jones v. State of Georgia, 1 Kelly 617, a contrary doctrine was held. A person jointly indicted, who served on the trial, was considered a competent witness for his co-defendant.

The authorities are, in some degree in conflict, but the weight of authority is against the admissibility of such evidence.

Public policy, in my opinion, is likewise against it. Men guilty of one crime are tempted to commit another in order to escape from the impending judgment.

The opinion of Judge Napton very plainly shows his view of this question, and how he would have decided it if necessary, in the case of McMillen v. The State in 13 Mo.

I come, therefore, to the conclusion that the court did not err in rejecting the evidence of the accomplice, Jones. The judgment of the criminal court is therefore affirmed, Judge Gamble concurring ; and the case is remanded to the court below in accordance

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criminal practice, for that court to proceed in order to have its judgment carried into execution.

Judge Scott dissents on the point of the incompetency of the co-defendant only.(a)

HICKEY, defendant in error, v. RYAN, plaintiff in error.

15 Mo. 62.

1. *Fraudulent conveyance*.—Pecuniary embarrassment, at the time of the sale of property, is not sufficient evidence of an intent to defraud creditors, in the absence of proof that such embarrassment was succeeded by insolvency or inability to discharge obligations.
2. *Instructions*.—An instruction which refers a matter of law to the jury is erroneous.

Error to St. Louis Circuit Court.

HILL, for plaintiff in error.

HUDSON, *contra*.

SCOTT, J., delivered the opinion of the court.

This was an action of assumpsit, brought by Hickey against Ryan, for services rendered. Hickey recovered judgment, upon which this writ of error is prosecuted by Ryan.

Hickey was employed by Ryan for a number of years, as a laborer, at \$14.00 per month, until his account amounted to a considerable sum. During the course of his employment, or shortly after its termination, Ryan obtained from him promissory notes amounting to \$1400. There was some proof that the consideration of these notes was the sale of an *ice house. The subscribing witness to two of the notes, [* 64] testified, that "to the best of his recollection, they had

(a) *State v. Jones*, 16 Mo. 388 ; *Young v. Croughton*, 17 Mo. 367 ; *State v. Edwards*, 19 Mo. 674 ; *Kick v. Merry*, 23 Mo. 75 ; *State v. Stotts*, 26 Mo. 307 ; *State v. Burnside*, 17 Mo. 348.

Ast to course to be pursued if there is no evidence against co-defendant, see *Hood v. Matthias*, 21 Mo. 308 ; *Brown v. Lewis*, 25 Mo. 338 ; *Benoist v. Sylvester*, 26 Mo. 535 ; *Steamboat Prairie Rose v. Cross*, 34 Mo. 109.

something to do with an ice house transaction, and sale of an ice house, by Ryan to Hickey." Ryan, he "thought, was embarrassed in his affairs at the time." There was no evidence as to the consideration of the other two notes. The defence to the notes, was, that there was no consideration for them, and that the sale of the ice house, by Ryan, was for the purpose of defrauding his creditors. There was evidence, showing that Hickey sold ice for Ryan for a considerable time and that he accounted with him for money received in the course of his employment. The defendant pleaded to the plaintiff's declaration, the general issue—set-off for goods and merchandise, money paid and laid out, money had and received upon an account stated, and the statute of limitations of two and five years. Issues were on these pleas, and the trial resulted in a verdict for the plaintiff for \$1045.80, of which the sum of \$42.00 was afterwards remitted.

The court gave the following instructions, at the instance of the plaintiff:

1. "That if the jury believe from the evidence, that the plaintiff was in the employment of the defendant, and rendered him services, they should allow him for such services, as much as they believed from the evidence, the same were reasonably worth—not to exceed fourteen dollars per month, for the time he was so employed, but not to exceed the limitation specified in the second instruction given for defendant. That if the jury believe from the evidence, that the plaintiff rendered services or performed labor for defendant, at his request, the plaintiff is entitled to recover for the same, unless the defendant has established by evidence, that he has paid for such services or labor, or has a legal and just offset against the same. The jury may allow interest, on the amount found to be due the plaintiff, from the date of the institution of this suit."

The court, of its own motion, gave the following:

As to the extent of the plaintiff's claim.

3. The jury are instructed that the plaintiff's claim in this action, is restricted to work and labor, and that he is not entitled to recover at their hands, any allowance of the proceeds, of ice, belonging to him, but received by the defendant.

As to the limitation.

4. The plaintiff can only be allowed, in this case, for work and labor, from and after the 3d day of October, 1841 ; all prior to that date the jury will exclude.

*As to the consideration of the notes.

[* 65]

5. The jury are instructed, that these, on their face, import a good and valuable consideration ; and if the jury shall be satisfied from the evidence, that they were executed by the plaintiff, and delivered to the defendant, it is for the plaintiff to establish by proof, satisfactory to the jury, that there is no such consideration. Neither a want, nor a failure of consideration is made out by showing the receipt, by the defendant, of moneys arising from the sale of ice, to which the plaintiff was entitled.

As to the question of fraud in this case.

6. The court instructs the jury that fraud must be proved ; but this rule does not exact direct and positive proof. It is only meant to signify to the jury, that while the existence of fraud may be presumed, whenever the facts and circumstances, disclosed by the evidence, render such presumption just and reasonable, yet, that without such evidence, no such presumption can be indulged in by the jury.

The court is asked to instruct you, to the effect, that no man can take advantage of a fraud, to which he is a party. This is so, but it is equally true, as a general proposition, that the law withholds its assistance, or protection from both parties to a transaction, shown to be fraudulent, and in which they concur. If, therefore, the jury shall be satisfied from the evidence of the notes or any of them, that Ryan was embarrassed in his circumstances, and that the said notes, or any of them, were executed in fulfillment of a design between the parties thereto, to hinder, delay or keep off Ryan's creditors, or to cover up or conceal his property from them, then the said notes, or such of them as shall be shown to have been made for that purpose, cannot be allowed the defendant in set-off.

The defendant asked the following, which were refused :

1. The plaintiff is not authorized to set up as a claim in this case, any moneys received by Ryan for the ice of the said Hickey

or for any money received from the proceeds of said ice sold for Ryan by said Hickey, and for which ice the notes were given ; the claim of the plaintiff, in this case, must be confined to his bill of particulars, filed, and the whole scope of the plaintiff's claim is for work and labor.

2. Before the jury can find that the notes in question were made in fraud, or without consideration, they must be satisfied, from the evidence, that such fraud or want of consideration has been proved and established by competent proof ; and the jury are to consider that fraud, in every case, must be proved by satisfactory evidence, and cannot be presumed ; and the jury are also [* 66] to consider that no party can insist in *defence or to avoid his notes, upon his own fraud or any fraud to which he is a party.

3. If the jury believe from the evidence, that the plaintiff executed the notes to the defendant, then the jury is instructed, that by the law, the said notes import a good and valuable consideration, and the amount thereof is a set-off in this case, and the plaintiff cannot be permitted to set up that said notes were executed by him to defraud the creditors of Ryan.

4. *Fraud, in any case, cannot be presumed, but must be proved, and no man can take any advantages of or found any defence upon his own fraud, or a fraud to which he is a party.*

5. If the jury should allow the plaintiff for any moneys that Ryan may have received for the ice sold by Ryan to Hickey, the said Hickey would not be barred, under the issues in this case, from suing for the same moneys received by Ryan for such ice.

6. The jury are instructed, not to allow the plaintiff in this case, anything for any moneys received by Ryan for ice sold by Hickey.

7. The jury are instructed, that in their consideration of this case, they are confined to the issues made by the parties in their pleadings.

8. The plaintiff cannot recover, nor set up any claim in this case beyond the bill of particulars filed, which limits the claim of the plaintiff to work and labor. The plaintiff in this action, for money received by Ryan for ice of Hickey, such claim being prop-

erly cognizable and the subject of another action, and the allowance of such a claim in this suit would operate to the injury of the defendant, by giving the plaintiff the opportunity of recovering twice for the same cause of action.

It is impossible for one to read the record in this cause, without feeling some misgivings as to the propriety of the verdict. It is hard to believe that Hickey, who was a poor laborer, should serve for five years, almost continuously, except when sick, without receiving some portion of his wages. The verdict has allowed him for all his services, not barred by the statute of limitations. He worked at the rate of \$14 per month, until his services amounted to upwards of \$1000, and during that whole time, it would seem, never received a cent. How he obtained his clothing, from what source he derived his pocket-money, we are left to conjecture. If his situation in life is considered, and the ability of Ryan to pay wages, our experience of the transactions of men should admonish us not to lend too ready an ear to the probability of such an occurrence. On the other hand, the existence of the notes in the possession of Ryan, is very mysterious, and although, by law, they import a consideration, and devolve upon Hickey the necessity of *avoiding them, by showing a [* 67] want of consideration, fraud or other defence, yet, under the circumstances, a jury would be warranted, on slight evidence, in finding against their validity. It is evident that the transactions between the parties, if we may judge from the record, was not fully explained to the jury. These observations are made, not as a reason for granting a new trial on the evidence, but as a justification for a thorough sifting of the instructions, in order to ascertain whether they are freed from all objections.

The instruction of the court, in relation to fraud, was, perhaps, too broad, taking into consideration, the slight evidence on which it was founded. Indeed, if all the evidence on the subject is preserved in the record, it may be questioned, whether it would have warranted an instruction, at all, relative to that matter. As the instruction, however, was brought out by the conduct of the defendant, in first asking one, on the subject of fraud, which was properly refused, he cannot complain that a proper

Billings *et al.* v. Atchison. 15 Mo.

one was given in relation to that matter; especially, as it seems a substitute for that sought by him. The only evidence of fraud, as to creditors, was that of the witness who thought that Ryan was embarrassed, at the time of the sale of the ice-house. Pecuniary embarrassment, at the time of the sale of property, unaccompanied with other circumstances, is not sufficient evidence of an intent to defraud creditors. There is no proofs, showing how the embarrassment eventuated. Whether it was succeeded by insolvency, or by inability to discharge his obligations, we are not informed. Insolvency is not an inevitable consequence of pecuniary embarrassment.

The instruction of the court, in relation to the set-off, given at the instance of the plaintiff, is objectionable—6 Mo. Rep. 273. The word "set-off" should not have been qualified with the words "legal and just." Such an instruction referred a matter of law to the jury, and directed them that their sense of justice might override the law.^(a) The overloading of the words of an instruction with epithets, in the hope of obtaining, thereby, an advantage in the argument before the jury, is not a very safe practice. It may frequently lead to reversals.

Judge Ryland concurring, the judgment is reversed and the cause remanded.

Judge Gamble did not sit in the cause.

BILLINGS, *et al.*, plaintiffs in error v. ATCHISON, defendant in error.

15 Mo. 68.

1. *Set-offs*.—An assignment in full of a note not negotiable can not be canceled so as to defeat set-offs which the maker may have against the assignee.

Error to St. Louis Court of Common Pleas.

TODD and KRUM, for plaintiffs in error.

HUDSON, *contra*.

(a) See McDermott v. Barnum, 19 Mo. 204; Valle v. Cerre, 36 Mo. 575.

St. Louis, to use of Yeatman and others v. Fox and Green. 15 Mo.

SCOTT, J., delivered the opinion of the court.

The evidence in the cause disproved the plaintiff's petition. It showed that the note was not assigned to McNair, but to the Knox Insurance Company. If the cancellation of the assignment, in full, to the Knox Insurance Company was made under circumstances which would not destroy its right of action, the suit might have been brought in its name, as the trustee of an express trust. See *Duty's adm'r. v. Dutcher*, decided at this term. If the holders of the note found it necessary to bring suit in their own name, all the circumstances should have been *stated, as in a bill in equity, showing their right, and [* 71] that there was no *mala fides* in their conduct in obtaining the note. For the reasons given in the case of *Davis v. Christy*, 8 Mo. Rep. 571, an assignment in full, of a note not negotiable, cannot be canceled, as may be done with negotiable paper. The parties to such an instrument cannot defeat or throw obstacles in the way of set-offs which the maker may have against any assignee, as would be done if assignments in full were permitted to be canceled. The other judges concurring, the judgment is affirmed.

ST. LOUIS to use of YEATMAN and others, respondents, v. FOX & GREEN, appellants.

15 Mo. 71.

1. *Jurisdiction*.—The Law Commissioner of St. Louis has no jurisdiction in an action on a penal bond in the sum of two hundred dollars. In actions on such bonds, the judgment is always for the penalty, which determines the jurisdiction of the court.

Appeal from St. Louis Law Commissioner's Court.

HART, for appellant.

PAGE, *contra*,

SCOTT, J., delivered the opinion of the court.

The only question in this cause is, whether the Law Commis-

sioner has jurisdiction in an action on a penal bond in the sum of two hundred dollars. The law gives jurisdiction to that officer "in all actions founded upon contract, where the debt, or balance due or damages claimed, exclusive of interest, shall not exceed one hundred and fifty dollars. The opinion has generally prevailed in this State, that the penalty of a bond determines the jurisdiction of the court. In actions on such bonds, the judgment is always for the penalty. It never was supposed that justices of the peace had jurisdiction on penal bonds, until the legislature authorized actions to be brought on constables' bonds, in their courts, on cases where the damages claimed did not exceed ninety dollars: *Wimer v. Brotherton*, 7 Mo. Rep., 264. The other Judges concurring, the judgment is reversed. (a)

PAGE & BACON, appellants, v. BUTLER, *et al.*, respondents.

15 Mo: 73.

1. *Delivery bond—Defense.*—In an action on a delivery bond, a security in the bond is estopped from setting up, as a defense to the action, title in himself to the property levied on.

Appeal from St. Louis Circuit Court.

[* 76] KNOX and KELLOGG, for appellants.

FIELD, *contra*.

SCOTT, J., delivered the opinion of the court.

The respondents present themselves in an attitude which precludes the court from rendering them the relief which they seek. Here is property levied upon on the 22nd day of May, and a bond given for its delivery on the 2nd day of September following the day of sale; it is forfeited, and a jury, on the 18th of November, is summoned at the instance and on the claim of one of the sureties to try the right of property, and having found the property described in the bond, to belong to the claimant,

(a) Gen'l Stat. 1865, chap. 150. Wagner's Stat. p. 239.

that verdict is returned as an excuse for the forfeiture. We hold that the claimant of property levied on by virtue of its delivery, can only avail himself of his claim by complying with the condition of the bond, delivering the property at the time and place required, and making his claim to it. If he suffers a forfeiture, he cannot by a future successful assertion of his claim, avoid the consequences. The bond is a statutory one, and can only be defeated by such defenses as are allowed by law. The statute gives no such defenses, and in an action at law for a breach of its condition, which is authorized, it is not pretended that such a defense could prevail. The form of procedure adopted to enforce the bond, cannot vary the defense. We do not see the force of the argument, that inasmuch as by the statute, *ten days* notice of the trial must be given to the creditor, and, as in all cases, a forfeiture of the bond may be had in *ten days from the levy*, a trial had after the forfeiture of the bond, should be effectual, as a defense, as if it had taken place prior to that event. If a claim to the property is interposed on the day of trial, notice may be given on the same day to the creditor, and the trial had on the day of the delivery of the property, according to the terms of the bond. If the claim is made within ten days from the time of delivery, the condition of the bond may be complied with, and the sale postponed to a day that would enable the sheriff to give the creditor the requisite notice. If this should be refused, the claimant would not be without his remedy, as he may sue the sheriff, or the purchaser of the property at his sale. Persons who have claims to property, seized under execution, will find that a forthcoming bond is a hazardous instrument, on which it is dangerous to litigate their rights. They should never become parties to them. If a creditor sues out his execution, which is levied on property, and a party should become security for its delivery, after the bond is forfeited he should not then, for the first time, be heard, in making
his claim to the property. Such a course is an injury [77]
to the creditor. It arrests his execution for months, as
in this case, by interposing a security on which he relies, and
after all other property of the debtor may have been disposed of,

or made way with, or it is too late for another levy or sale, it takes away the means to which he looked for satisfaction of his debt; and that, too, by one who had bound himself that those means should be forthcoming for the payment of his demand. The determination of this case is based upon the principle, recognized in the courts of many of our sister States, that when goods, seized under execution, are delivered to a third person, on his giving a receipt, promising to re-deliver them on a given day, and the receiptor refuses to comply with his promise, claiming that the goods, at the time of the levy and receipt, were his own, he is estopped from setting up title in himself, in an action on his undertaking: *Dezell v. Odell*, 3 Hill 215; *Bursley v. Hamilton*, 15 Pick. 40.

The case of *Lampres v. State*, 7 Black. 43, cited by the respondents, to show, that after a forfeiture, a trial of the right of property in which the right is found for the claimant, though a party to the forthcoming bond, will be a defense against any proceedings on it, is not in point. In that case, it may be gathered from the statement, that the trial of the right of property took place before a forfeiture, and in consequence of the finding there was no delivery. In the case of *Long v. United States*, Freem. Miss. Reps., the surety, who was relieved, was not a party to the forthcoming bond. The case of *Bursley v. Hamilton*, 15 Pick., cited to show that the finding of the jury, that the property is not in the debtor, might be given in evidence, in mitigation of damages, is not applicable. That was an action of assumpsit, to recover damages for the non-delivery of the property by the receiptor. This is a proceeding under a bond with a penalty, and the law has fixed the rule by which the damages shall be estimated in case of a forfeiture.

Under the statute regulating proceedings in courts, Butler was a competent witness.

The other Judges concurring, the judgment is reversed and the cause remanded. (a)

(a) *Robards v. Samuel*, 17 Mo. 555; *Waterman v. Frank*, 21 Mo. 108.

McCABE, respondent, v. LECOMPTE, appellant.

15 Mo. 78.

1. *Justice Court—Appeal.*—Notice of an appeal from a justice's Court is still necessary, notwithstanding a continuance may have been granted at the first term for want of it, unless the appellee appears or does some act which is tantamount to, or a waiver of, notice.

Appeal from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

McCabe, as surviving partner of Lane & McCabe, sued Lecompte before a justice of the peace. The cause was tried in July, 1850. There was a judgment in favor of Lecompte, and within ten days McCabe appealed to the St. Louis court of common pleas. The record was returned to the Sept. term, 1850, of that court: but no notice of the appeal having been given to Lecompte so as to render the cause triable at that term, it was continued, of course, to the February term, 1851. At that term, it was regularly docketed and tried, when judgment was rendered for the plaintiff.

The defendant, Lecompte, after the end of four days, after this judgment, moved to set it aside; the reason assigned, being, that the defendant had no actual notice of the appeal; which motion was overruled, and defendant excepted.

The only question, then, is, whether the want of notice of an appeal from the judgment of a justice of the peace, has any other effect than to cause a continuance of the case at the return term.

The defendant, Lecompte, maintains that an appeal so taken, is not triable until actual notice has been given.

The respondent maintains that the appeal so taken is triable at the second term at any rate, unless continued for cause; the only effect of the failure to give notice, being, to cause a continuance for one term, (the return term) at the cost of the appellant.

MORROW & DELAFIELD, for appellant.

A. P. & P. B. GARESCE, *contra*.

RYLAND, J., delivered the opinion of the court.

The only question in this case, is the one with regard to notice.

[* 79] *The judgment before the justice of the peace, was in favor of the defendant. Some days afterwards the plaintiff appealed, but gave no notice of his appeal to the defendant. At the first term of the court of common pleas, to which the appeal was taken, the cause was continued at the costs of the appellant. At the next term, the cause was called for trial and judgment was rendered, by default, against said defendant. The defendant afterwards moved to set aside this judgment and filed her affidavit in support of the motion, alleging want of notice of the appeal. This motion was overruled, and the case comes before us upon the construction of the 22nd section, article VIII, concerning "justices' courts," Rev. Stats. 1845, which is as follows, viz: "If the appellant fails to give notice of his appeal where such notice is required, the cause shall, at the option of the appellee, be tried at the first term, if he shall enter his appearance on the first day thereof, or, at his instance, shall be continued, as a matter of course, until the succeeding term, at the costs of the appellant; but no appeal shall be dismissed for want of such notice."

The plaintiff below, contends, that the appeal is properly for trial at the next term after the first continuance, whether notice of the appeal was ever given or not.

The appellant in this court contends, that the notice is still necessary, although a continuance was had at the first term, for want of such notice. That such continuance does not necessarily dispense with the notice, and that the appeal is never properly for trial, until notice of it has been given, or until the appellee has done some act by which notice is presumed to have been given, or the want of it waived.

We consider the appellant's construction of this section, the true one. Notice must be given, notwithstanding the first continuance; unless the appellee appears, or does some act which may be considered tantamount to notice. This construction is more consonant with the principles of justice. A party should have his day in court. We, therefore, come to the conclusion, that the 22nd section, above recited, does not properly authorize the court below to try the appeal after the first continuance, unless

notice has been given. The judgment of the court of common pleas is therefore reversed, the other Judges concurring herein. (a)

McGILL, plaintiff in error, v. SOMERS & McKEE defendants
in error.

15 Mo. 80.

1. *Evidence—Recorder's Certificate.*—A certificate of confirmation issued by the recorder under the act of 26th May, 1824, is only *prima facie* evidence of a confirmation under the act of the 13th of June, 1812—Biehler v. Coonce, 9 Mo. Rep. 347; Macklot v. Dubreuil, *ib.* 477; Boyce v. Papin, 11 *ib.* 16.
2. *Same—Recorder Hunt's descriptive list.*—The descriptive list sent to the surveyor's office, by authority of the act, is evidence of as high a character as the certificate would be, and a properly authenticated extract from it, is entitled to all the effect that the original certificate would have—Biehler v. Coonce, 9 Mo. Rep. 343.
3. *Survey—Effect of.*—A survey when examined and sanctioned as contemplated by law, is conclusive upon the government, upon all persons, who claim under titles subsequent to the survey, and, upon mere intruders and strangers without title: and it is *prima facie* evidence of locality against all persons, who claim under an opposing title.
4. *Titles—Conflicting.*—If two titles properly located and covering the whole or part of the same land, are of the same age and description, the defendant being in possession cannot be disturbed.
5. *Titles to land.*—A confirmation under the first section of the act of 13th June, 1812 if, of a common field lot, is superior to an opposing title, which stands alone upon a confirmation, under the act of 29th April, 1816.
6. *Same.*—A confirmation under the act of 1816, when properly surveyed, is superior to a New Madrid location.
7. *Deeds—Construction.*—Known and fixed monuments, called for in a grant or deed, control the courses and distances stated in the same instrument.

Error to St. Louis Circuit Court.

HAIGHT, for plaintiff in error.

(a) Gen'l Stat. of 1865, chap. 185, § 22; Wagner's Stat., p. 850.

SPALDING, *contra*.

[* 83] *GAMBLE, J., delivered the opinion of the court.

The plaintiff, McGill, claims the land in controversy, under a confirmation by the Act of Congress of 29th April, 1816, to Francis Cottard, and a survey under the confirmation. The defendant's claim title under the location of a New Madrid certificate, in the name of James T. O'Carral, or his legal representatives. They also set up, as an outstanding title, a confirmation to Joachim Roy's representatives, and a survey under it, conveying the land in controversy. The evidence to establish Roy's title, consists of extracts from the minutes kept by the recorder of land titles when taking proof under the act of Congress of the 26th May, 1824, and an extract from the list of claims proven before him, which was sent to the office of the surveyor general as required by the act. The defendants also exhibited the titles of Augusta Chouteau, of Joseph Motard and of the commons of the town of St. Louis. The surveys of these claims embraced nearly all the land surveyed under the Cottard confirmation, but this suit is brought to recover land not included in either of the three last mentioned claims. Roy's survey is the only one established by the defendant, except that of the New Madrid claim which includes the land in controversy.

The defendants allege that Cottard's survey is made at the wrong place, and use the claims that conflict with it, as evidence of its improper location.

At the request of the defendants the court below gave the following instructions:

1. If the land sued for in this action lies within the claim confirmed to Joachim Roy as said claim is shown by transcripts produced from recorder Hunt's proceedings and list sent to the surveyor's office, then there can be no recovery in this action.

2. That if the jury find from the evidence that the Cottard claim and confirmation have been improperly located and surveyed, and, that if properly located, it would not include the land in controversy in this suit, they will find for the defendant.

3. That the survey of the St. Louis commons, given in

evidence in *this case by defendants, is to be presumed [*84] to be correct, and to be the true boundary thereof, unless it is proved otherwise, and that if the Cottard claim is located so as chiefly to be within the land confirmed to the "inhabitants of the city as commons" then such location is an erroneous location.

4. That the survey of the Cottard claim given in evidence is not conclusive ; but that the jury are to judge from all the circumstances, as to the propriety of such location ; and if they believe from the evidence that it is located and surveyed in the wrong place, they will find for the defendant.

5. That the location and survey of the Joachim Roy claim, is presumed to be correct, until the contrary be shown ; and the jury are bound to consider it a correct survey, unless its correctness be disproved.

6. If the common field lot confirmed to Cottard lies wholly within the survey of the Chouteau mill tract, as made by Brown or Paul, except so much of it as extends farther west than the west line of said mill tract, then there can be no recovery in this action.

7. If the jury believe from the evidence that the land of Motard, cultivated by him at Cul-de-Sac was a common field lot, and that the same was possessed and cultivated by him, under the Spanish government till he sold to Lee, and that Lee and Adams, or one of them, continued to cultivate and possess it, till after the change of government, the said land was confirmed to Motard or his representatives by the act of the 13th June, 1812, and the title thereof is older in point of time, and paramount to that of Cottard, if they conflict with each other.

8. If the jury find from the evidence that the common field lot claimed in Cottard's name was possessed and cultivated by Adams prior to 20th December, 1803, and that he was the last cultivator and possessor of the same before the change of government, then the act of 13th June, 1812, confirmed the same to him, and the subsequent confirmation to Cottard by the recorder, is inoperative and passed no title.

The plaintiff asked the court to give the following instructions, which the court refused :

1. The confirmation to Francis Cottard, given in evidence, and the survey and location given in evidence, under the authority of the United States, vested the land in controversy in the said Francis Cottard as against the title under which the defendant's claim, unless the jury believe from the evidence in the case that the survey and location, given in evidence are entirely erroneous and that the land confirmed to Cottard is other and different from the land so surveyed and located.

[* 85] *2. If the jury believe from the evidence, that a part of the land confirmed to Cottard is within the survey to Motard, or within the commons, or within both as confirmed and surveyed under the several acts of congress, this will not entitle the defendants to a verdict in this case, if the jury believe the land in question, in this suit, is not embraced either in the Motard survey or survey of the commons.

3. The certificate and evidence under which a survey has been made to Joachim Roy is not a confirmation in the sense of a grant by the United States, and if it was, in case of any conflict between that and the confirmation to Francis Cottard, the latter will be preferred, being the older title; that is, the confirmation to Cottard, if the land has been correctly surveyed, as described in the official survey, is the better title.

4. In ascertaining the location of a grant, monuments and visible boundaries in the grants and surveys, will control courses and distances, and when they disagree the line must be run according to the visible boundaries given, though it should disagree with the courses and distance as ascertained by the surveys made since the grant or deed.

5. If the jury believe from the evidence, that the premises in question in this suit are not within the St. Louis commons as surveyed, and are not within the survey of the confirmation to Motard's representatives, then, neither of these can be set up by the defendants as outstanding titles to defeat the plaintiff's recovery, claiming to be representatives of Cottard.

6. If the jury believe from the evidence, that the concession to Cottard was duly executed, and that his will, given in evidence, was duly made and published, and that the deed from Etienne

Roussin was duly executed to Albert Tison, and that said Albert Tison is dead, and the plaintiffs are his heirs at law, and that the land confirmed to said Cottard by act of congress of 29th April, 1816, included the premises in question, they will find for the plaintiffs.

7. If the land conceded to Cottard was a common field lot, adjoining the common fields of the Cul-de-Sac, and the concession was duly executed at or about the time it purported to have been, and that the land in said concession was cultivated, inhabited and possessed by said Cottard prior to 20th December, 1803, then the same was confirmed by the act of congress of 13th June, 1812.

8. If the jury believe from the evidence that a part of the land confirmed to Cottard [was] within the survey to Motard, within the commons or within both, as confirmed and surveyed under the several acts of congress, this will not entitle the defendants to a verdict in this case, if the court sitting as a jury, find that the survey and location to Cottard is *correctly made, [*86] under the confirmation to said Cottard, and that the land sued for is within said confirmation and survey and outside the survey of the commons and the claim of Motard.

9. Under the proof in this cause, the court sitting as a jury and finding the law and fact, is required to decide that the claim of Adams and the confirmation thereon is not a common field lot or out lot, within the meaning of the act of 13th June, 1812.

10. The court sitting as a jury, should find, that no claim having been made by Calvin Adams to the land confirmed to Cottard, and said Adams, and those claiming under him, accepted a confirmation and survey excluding the land in controversy in this suit, and no claim having ever been made under said Adams, to those claiming under him to said land, then the title acquired by said Adams and given in evidence in this case, is not a bar to the recovery of the land claimed in this cause.

The first instruction given by the court, makes the action of the recorder upon the claim of Roy's representatives conclusive against the plaintiff as an outstanding and superior title.

The act of 26th May, 1824, required the owners of town lots, out lots, and common field lots which had been confirmed by the

first section of the act of 13th June, 1812, to appear before the recorder and prove the extent and boundaries of the lots so confirmed, the recorder was required to submit a list of the claims so proved to the surveyor general, and another copy of the list to the general land office and to give a certificate of confirmation to the owner.

The evidence in this case consisted of extracts from the recorder's minutes and from the list sent to the surveyor. The certificate was not produced.

The court did not leave to the jury the question of fact, whether the land in controversy was embraced in the tract confirmed to Roy by the act of 1812, but informed them "that if it was embraced in the claim confirmed, as shown by the transcripts produced from the recorder's proceedings, and the list sent to the surveyor's office, then the plaintiff cannot recover." The effect thus given to the acts of the recorder, is to make them conclusive of all questions of title and locality under the act of 1812. A reference to the different cases decided by this court, will show that this instruction of the circuit court goes far beyond them, in the effect given to this evidence. The cases, from *Janis v. Gumo*, 4 Mo. R., 458, to the present time, have maintained that the certificate of confirmation issued by the recorder under the act of 26th May, 1812, is only *prima facie* evidence of a confirmation by the act of 13th June, 1812; *Biehler v. Coonce*, 9 [*87] Mo. R., 347; *Macklot v. Dubruil*, 9 Mo. *R., 477; *Boyce v. Papin*, 11 Mo. R., 16. In the case of *Biehler v. Coonce*, the court expressed an opinion upon the admissibility of the extracts from the recorder's books and gave to them the same effect as to a certificate issued to the party. The descriptive list sent to the surveyor's office, under the command of the act is evidence of as high a character as the certificate would be, and a properly authenticated extract from it, is entitled to all the effect that the original certificate would have. (a) Still

(a) *Gamache v. Piquignot*, 17 Mo. 310; *Soulard v. Allen*, 18 Mo. 590; *Joyall v. Rippey*, 19 Mo. 660; *Vasquez v. Ewing*, 24 Mo. 31; S. C. 42 Mo. 247; *Primm v. Haren*, 27 Mo. 205; *Robbins v. Eckler*, 36 Mo. 506; *Clarke v. Hammerle*, *id.* 620; *Gibson v. Chouteau*, 39 Mo. 570; *Williams v. Carpenter*, 42 Mo. 327.

the instruction is erroneous, for it makes the evidence conclusive against a person claiming the same land by a confirmation under the act of 1816, and a survey under such confirmation. If Roy was entitled to the land by a confirmation under the first section of the act of 1812, his title is superior to the confirmation under which the plaintiff claims, but the plaintiff is entitled to dispute the fact that it was so confirmed to Roy.

Several of the instructions given, involve the question, how far the surveys made under the authority of the United States are evidence of the true location of the claims surveyed.

The government has provided, from the time of its first action upon land claims in Missouri, for surveys to be made by its own officers; and by the first section of the act of 29th April, 1816, providing for the appointment of a surveyor in Illinois and Missouri, it is made his duty "to cause to be surveyed all lands the claims to which have been or may be hereafter confirmed by any act of Congress which have not already been surveyed according to law:" 3 Statutes at Large, 325.

Surveys of these claims are alike necessary to the claimants and the government. To the claimants in order that they may have the boundaries of their land defined, and to the government that the lands may be ascertained which are subject to disposition under its laws. The acts of Congress thus imposing the duty upon the officer, acknowledge the right of every person having such claim to have his land surveyed. When the survey is made and passes through the examination and receives the sanction contemplated by law, it is conclusive upon the government. It is in like manner conclusive upon all persons who claim title to the land, under titles originating subsequently to the survey; (a) and it is of course conclusive upon all mere intruders and strangers without title to the land. It is *prima facie* evidence of locality against all persons who claim under an opposing title; for, to make it less would be to deny to the claimant the right to have his land designated and set off to him, which the laws have always conferred. (b) If there is a conflict with another title,

(a) Dent v. Sigerson, 29 Mo. 512; Robbins v. Eckler, 36 Mo. 507.

(b) Gibson v. Chouteau, 39 Mo. 570.

it must be with a claim having its locality ascertained by another survey, and when two surveys thus conflict, the question [* 88] *of the proper locality of each, is to be determined by evidence running back through the whole history of both claims. If it appears, when all the evidence is presented that the two titles when properly located, cover the whole or part of the same land, then the right will be determined as a question of law, in favor of the party whose title by the character and age, is the superior title. If the titles are of the same age and description, and there is no evidence to impeach the correctness of the survey of either, then the defendant, being in possession, cannot be disturbed.

It is a great error to suppose that two surveys may not be correctly made to cover the same land. The history of land claims in this vicinity abundantly proves that the same land has been included in different grants from the Spanish government, and that confirmations have been made, under the United States, to different individuals, which cover the same land. The fact then, that confirmations are represented by surveys to embrace the same land, is no impeachment of the correctness of the survey. When therefore the court told the jury in this case, by the third instruction, "that the survey of the St. Louis commons, given in evidence by the defendant, is to be presumed to be correct, and to be the true boundary thereof, unless it is proved otherwise; and that if the Cottard claim is located so as to lie chiefly within the tract confirmed to the inhabitants of the city, as commons, then such location is an erroneous location," an error was committed in stating the consequences of such conflict between the surveys. And so the 6th instruction, which declares that the interference of the Cottard claim with the survey of the Chouteau mill tract, is conclusive evidence of error in the location of the Cottard claim, is equally erroneous. (a)

It is not necessary in the present state of the law, as settled by judicial decisions, to employ argument in support of the position, that a confirmation by the first section of the act of 13th

(a) Gibson v. Chouteau, 39 Mo. 562.

June, 1812, if a common field lot, is superior to an opposing title which stands alone upon the confirmation by the act of 29th April, 1816.

If the act of 1812 gave the land to one person, the act of 1816 would not give it to another. The 7th and 8th instructions were therefore properly given. (a)

There are several of the ten instructions asked by the plaintiff and refused by the court, which will need no comment, as upon a future trial of the case the principles already declared as to the effect of surveys will furnish a sufficient guide to the circuit court.

In regard to the first instruction asked by the defendant, it is only necessary to say, that if the plaintiff's claim, under a confirmation by *the act of 1816, when surveyed [* 89] in its proper place conflicts with a New Madrid location, that the confirmation is the better title.

The fourth instruction declares the effect of monuments and visible boundaries as controlling course and distance in the location of a grant. It has so often been declared, that known and fixed monuments, called for in a grant or deed, will control the courses and distances stated in the same instrument, that it is not necessary to refer to authorities upon the point. It is believed that in most if not all the States the law has been thus settled. As the instruction does not apply the principle to the calls of any grant or deed which was in evidence before the jury, it is impossible for this court to determine whether the instruction was rightly refused or not. It sufficiently appears from what has been said that the circuit court has erred in the instructions given to the jury, and therefore with the concurrence of the other judges the judgment is reversed and the cause remanded for further proceeding, according to this opinion.

(a) *Soulard v. Clark*, 19 Mo. 570; *Vasquez v. Ewing*, 42 Mo. 264.

Harney, adm'r of Duty v. Dutcher & Dutcher. 15 Mo.

HARNEY, adm'r of Duty, appellant, v. DUTCHER & DUTCHER,
respondents,

15 Mo. 89.

1. *Practice—Right of action.*—Where a contract is made with one as administrator, he, or his personal representatives, and not the administrator *de bonis non*, must bring suit on it. And this is not changed by the new Code.(a)
2. *Administrator—Effects unadministered.*—When the property in any of the effects of the deceased, has been changed by the original administrator, and has vested in him, in his individual capacity, such effects will go, to his own representatives, and not to the administrator *de bonis non* of his intestate.(b)

Appeal from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an action brought by plaintiff as administrator *de bonis non* of Duty's estate on a written instrument of defendant's executed to John F. Darby, who was the preceding administrator of said estate, for the hire and conditional return of a slave, belonging to said estate. Plaintiff became administrator on the 22d day of June, 1850, Darby having previously resigned; and the said obligation or instrument did not mature until the 14th day of July following.

The said instrument of defendants, which was made a part of plaintiff's petition, is in words and figures as follows: "\$84, St. Louis, 14th July, 1849. We, T. B. Dutcher as principal, and C. O. Dutcher as security, promise to pay John F. Darby, administrator of the estate of Milton Duty, deceased, the sum of eighty-four dollars, twelve months after date, for value received, negotiable and payable without defalcation or discount, it being for the hire of a negro man named Nat, belonging to said estate. We are to feed and clothe said slave and afford and furnish him medical attendance during the whole of said term; not remove him from the county of St. Louis during said period, and to return said slave, if alive, to said administrator, in the city of St. Louis on the fourteenth day of July, 1850. Signed.

T. B. DUTCHER,
C. O. DUTCHER."

HARNEY, for appellant.

KASSON, *contra*.

(a) Gen'l Stat. of 1865, chap. 161, §§ 2, 3. Wagner's Stat., p. 999.

(b) *Id.* chap. 120, § 47. Wagner's Stat., p. 77.

SCOTT, J., delivered the opinion of the court. [93]

As to the point made under the new code of procedure, that the action must be prosecuted in the name of the real party in interest, and that consequently the suit may be brought in the name of the administrator *de bonis non*, he being now the real party, it may be observed, that the statute allows the trustee of an express trust to sue in his own name. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust. The promise, then, being made to Darby, the former administrator, he is either entitled to the benefit of it in his own right, or he is trustee for others. If he is trustee, the suit may be brought in his name, for those who are entitled to the money. If the contract was made to him, in his own right, he is also the proper person to sue. (a)

The case of *Hirst v. Smith*, 7 D. & E., 182, maintains the doctrine *that when the cause of action is [* 94] such that the first administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the intestate. Thus understood, it is sustained by the case of *Catherwood v. Chaubauc*, 1 Barn. & Cres. 150. But all the authorities show that Darby could not have sued on the contract, now in controversy, in his representative character. None will maintain, that in an action by Darby, on the agreement under consideration, a profert of his letters testamentary would have been necessary. This would seem to be the test, whether a suit is in his own right or in his representative character. When the property in any of the effects of the deceased, has been changed by the original executor or administrator, and has vested in him, in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non*. (b) In *Drue v. Baylie*, 2 Frem., an administrator made an underlease of the intestate's term of years, reserving rent to himself, with a covenant to pay him rent, and died; it was holden that his executor, and not the administrator *de bonis*

(a) *Kennerly v. Shepley*, *post.* p. 640; *State v. Moore*, 19 Mo. 371; *Van Doren v. Relfe*, 20 Mo. 455; *Miles v. Davis*, *id.* 408.

(b) But see *State v. Hunter*, *post.* p. 490.

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non, should have the rent. The same principle, as to the person in whose name the suit should be brought on a contract somewhat similar, was maintained in the case of *Skippington v. Budd*, 3 Young & Coll. 1, and affirmed in the House of Lords. So, where one died intestate, and his son took out administration to him, and received part of a debt, being rent in arrear to the intestate, and accepted a promissory note for the residue, and then died intestate, it was held that this acceptance of the note, was such an alteration as vested in the son, and therefore, on his death, it should go to his administrator, and not to the administrator *de bonis non*. In the case of *Boyd v. Sloan*, 2 Bailey, S. C., an executor, acting under a will which was afterwards set aside, leased the lands of his supposed testator for a year, and the tenant enjoyed the demised premises without interruption. It was held, that neither the administrator, subsequently appointed, nor the heir of the intestate could maintain an action, but that suit should be brought in the name of the executor, he having made the contract. That although the executor may be thus styled in the body of the note, and it [be] made payable to him as executor, still, he and his personal representatives must alone sue upon it. That the term executor or administrator, is a mere *descriptio personæ*.

The other Judges concurring, the judgment is affirmed.

McCOURTNEY *et al.*, appellants, v. SLOAN *et al.*, respondents.

15 Mo. 95.

1. *Surety—Contribution.*—A surety may use the name of the creditor in a suit to enforce contribution from a co-surety.
2. *Equity—Powers.*—If a party, in the prosecution of a lawful demand, in a lawful way, fairly acquires a legal right, it cannot be disturbed by a court of equity. To justify such interference there must be some trust, confidence, agreement, or relationship imposing an obligation to avoid the advantage obtained.

Appeal from St. Louis Circuit Court—in Chancery

STATEMENT OF THE CASE.

Sometime in the year 1819, John McCourtney, Sr., John McCourtney, Jr., Thos. Sloan, the defendant, and Solomon G. Krepps, all living in Fayette county, Pa., became sureties for the firm of Baltzell & Danforth, at Wheeling, Va., for a debt which that firm owed to one Jonathan Walton, for whisky, and for which they gave their joint obligations, with their principals, dated the 11th of June, A. D. 1819, payable nine months after date, for \$743.50, with interest. Afterward said Baltzell & Danforth, the principals having become insolvent, the said sureties, on the 25th of July, 1821, confessed judgment in favor of said Walton for the debt, amounting to \$836.43½ and costs, which was duly entered of record, on the 30th of said July in the court of common pleas of Fayette county, and on which Sloan and Krepps paid Walton \$418.20, on said 25th of July. On the first of January, 1822, John McCourtney, Sr., and wife, by their deed of that date, conveyed the premises described in the bill, for the consideration of love and affection, to the complainant, Martin McCourtney, of which the defendants at the time, had actual notice. And in pursuance of and under said conveyance, said Martin, as early as the spring of 1833, took possession of, and ever since has resided with his family upon said premises, cultivating and improving them by clearing the land and erecting fences and several buildings upon the same. And on the 27th of January 1841, sold to his co-plaintiff, Henry H. Goodwin, by deed, in due form and duly recorded, 245.17 acres of said premises, for the consideration of \$1580.00.

On the 10th of December, 1822, and while said Sloan and Krepps, as yet, had paid no more than their own share of the aforesaid security debt, a suit by attachment was commenced in the circuit court of St. Louis county, against John McCourtney, Sr., as a non-resident, in the name of Jonathan Walton, upon the aforesaid judgment, in which the sum sworn to was \$418.23½ cents. The said John McCourtney, Sr., the defendant in the attachment suit, was not served with process, nor did he appear in the case, but the attachment was levied upon the the premises described in the bill. On the 29th October, 1823, judgment by default was rendered upon publication of notice to John McCourtney, Sr., as a non-resident defendant, for \$827.06 and \$112.37 damages, and costs of suit, although the sum sworn to was only \$418.23½, with interest from the 25th of July, 1821. On the 13th of February, 1829, a special *fi. fa.* was issued against the land attached, under which it was sold on the 25th March of that year, to Spalding, the attorney of Sloan and Krepps, for whom he was acting in the matter of the purchase, and for whose benefit he purchased the same, for \$50.00, with the understanding that he would, at any time, convey the land to them, on their paying him his fees for his services. The \$50.00 paid by Spalding for the land, was credited upon the execution, he paying the money to the sheriff and a deed was executed to him by the sheriff for the land. At the time of the sale, the land was worth from nine to ten dollars per acre, and there were 480 arpents, or 408.33 acres in the tract.

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Afterwards, Spalding, still acting as the agent and attorney of Sloan & Krepps, on receiving from them his fees aforesaid, amounting to \$32.00, conveyed the land, by his quit claim deed, on the 28th October, 1829, to Sloan & Krepps, for the nominal consideration of \$1.00. After the purchase for Sloan & Krepps, by their agent and attorney, Spalding, as above stated, the defendant, Sloan, on the 25th July, 1829, called on John McCartney, jr., in the city of Wheeling, where he then resided, and demanded of him contribution, on account of his suretyship, as stated above. The bill alleges, that the demand by Sloan, was for said John's contributory share, say $\frac{1}{4}$, and also for the share of John McCartney, Sr., being also $\frac{1}{4}$, that is for one-half; and said John, jr., on his oath testified to the same thing. It is also alleged in the bill, and sworn to by said John, jr., as a witness, that the said John, jr., did pay the aforesaid contributory shares, with interest, both for himself and John, Sr., having executed his three notes therefor, which were paid at maturity. It is stated by Sloan, in his answer, and deposed by said Jonathan Walton, that said Jno. McCartney, jr. paid only his own contributory share of one-fourth, and one-third of the share of Jno. McCartney, Sr. and so the circuit court found. But on the settlement, between Sloan and John McC., jr., the land bought for Sloan & Krepps, by Spalding, and conveyed to them by him, as aforesaid, and shown to have been worth from nine to ten dollars per acre, was not taken into account, nor was any credit given by them for the same in the settlement.

The court below decreed, that upon the payment, by complainants to defendants, of the contributory share of Jno. McC., Sr., of said security debt, with interest, the title to the premises described in the bill, vested in them; holding that said land was liable for said contributory share of Jno. McC., Sr. There was evidence of the insolvency of Jno. McC., Sr., on the 11th of January, 1822. The deed from Jno. McC., to Martin, offered in evidence by complainants, being an exhibit to his bill, was objected to because the certificate of acknowledgment was defective, in that it did not establish the identity of the grantor.

WELLS & BUCKNER, for appellants.

POLK, *contra*.

[* 99] *SCOTT, J., delivered the opinion of the court.

After a full examination of this cause, we cannot perceive the grounds on which an affirmance of the decree below can be sustained. That decree, although its aim seems to be to do what is justice between the parties, is based upon principles at war with the rights of the appellants, acquired by due course of law. They insist on their rights, and although in the course of events, they have got the advantage, yet their conduct does not

appear to have been affected by any circumstances which can impair their claims.

The matter of pledging the whisky to Sloan, as an indemnity to him and his co-securities, may be laid out of the question, as the charge is not supported by the evidence.

After Sloan and Krepps had satisfied half of the judgment against the four sureties, there was no impropriety in their using the name of Walton, the creditor, in order to recover the share of the debt due by John McCourtney, Jr. Such a transaction is of daily occurrence; sureties are constantly using the names of creditors to enforce contribution from a co-security. Although the judgment was rendered for a sum twice as great as it should have been, yet that circumstance does not attach any blame to the appellants, as it appears from the records, that the sum actually due was only claimed, and the affidavit for the attachments only verified that sum. The error, in the rendition of the judgment, was plainly a clerical misprision, and, so far as this cause is concerned, did not prejudice John McCourtney, Sr. The fact that Sloan did not call upon John McCourtney, Jr., for a settlement of his portion of the surety debt, until after the sale of the land in controversy

under an execution in the attachment suit, and his failure [100] to mention that circumstance at the time of the settlement, creates no suspicion of a desire on his part, to obtain an undue advantage over McCourtney. The fact that John McCourtney, Sr., was insolvent, imposed on the three remaining sureties an obligation to satisfy his portion of the debt. Until the determination of the attachment suit and a sale, it could not be ascertained what portion, if any, of the surety debt would fall upon him. The suit, we may suppose, was wholly unavailing. The land sold for fifty dollars only; of this sum, thirty-two dollars were paid as the attorney's fee. Considering the nature of the suit and the residence of the parties, little is hazarded in saying, that the balance of the sum was absorbed in the payment of the costs and fees. It does not appear that Sloan knew the value of the land at the time of the sale. He knew of the claim of the defendant, and that must have depreciated it in his estimation. It is a little

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remarkable, that this land should have been worth ten dollars an acre, upwards of twenty years ago, and should have been sold in 1841 for less than seven dollars an acre. But it is a satisfactory answer to the objection of a failure to disclose the prosecution of the attachment suit, that there was no trust, confidence, agreement, or any relationship between Sloan and John McCourtney, Jr., which imposed on him any such obligation. There was no fraud, nor any circumstance which can affect Sloan with bad faith. In the prosecution of a lawful demand, in a lawful way, he had fairly acquired a legal right, and no law imposed on him the necessity of disclosing the fact or accounting for his purchase to any one.

The objection, that no demand was made on John McCourtney, Sr., before the institution of the attachment suit, cannot, with any propriety, be urged in this collateral proceeding. He might have appeared in the circuit court, at any time within three years, and contested the legality of the proceedings against him. Not having done so, no error in them can now be enquired into.

It is not pretended that the deed to complainant, Martin McCourtney, by his father, John McCourtney, in 1822, was, under the circumstances, valid against the defendants, Sloan and Krepps. The view we have taken of the case relieved us from the necessity of determining as to the sufficiency of the certificate of acknowledgment of that deed, and no opinion is advanced on that question. The other Judges concurring, the decree is reversed and the bill dismissed. (a)

SIGERSON, respondent, v. HARKER, appellant.

15 Mo. 101.

1. *Contract—Rescission of.*—The rescission of a contract for sale of a lot of goods, with warranty, must be entire. The vendee cannot select such as will answer the warranty and return the remainder.
2. *Sale—Delivery.*—The delivery of a vendor to a vendee of an order on a depository for goods sold is a delivery of the goods.

Appeal from St. Louis Court of Common Pleas.

(a) For case growing out of this, see *Walker v. Bacon*, 32 Mo. 144.

GRAY, for appellant.

*KNOX & KELLOGG, *contra*.

[*104]

SCOTT, J., delivered the opinion of the court.

It can scarcely be necessary to say, that the court committed no error in admitting parol evidence of the contract between the parties, there being no written one. On no pretence can it be said that the open account was a written contract.

The instruction given by the court, at its own instance, was liable to exception. Without entering into the question, whether a contract with a warranty, as to quality in a sale of chattels, which contract has been executed, the vendee for a breach of warranty in a case unaffected with fraud, can return the article, when there has been no stipulation to that effect, and recover the purchase money, or is driven to his action on the warranty, we are of opinion, that on other grounds the instruction cannot be sustained. The charge goes the length of maintaining, that in a sale of goods with warranty, the vendee may take them, select such as will answer the warranty, and return the remainder. In such a case, if there could be a rescission of the contract, it would seem that it should be entire. Where there is a sale, with warranty, of a lot of goods, consisting of many articles, it would be manifestly unjust to permit the vendee to select such, as he supposed, corresponded with the warranty, and return the remainder. Such a course, in most cases, *would pre- [*105] judice the sale of the rejected articles. The separation would diminish the probability of a sale of them. A good article may sell a bad one, and many good ones may frequently carry along with them a few that are indifferent. The evidence shows, that there were barrels returned which were not taken from Shidy & Lumis' warehouse; and as those at Darah & Pomeroy's were of good quality and not complained of, we must suppose that some of the returned barrels composed, in part, the lot on the levee. We are aware that there may be sales with warranty, when the articles sold are to be delivered, not at once, but continuously, from time to time. In such cases, the receiving of a portion of the articles which corresponded with the description,

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would not compel the vendee to accept others which were deficient in quality, especially in cases where the portion received has been in any way appropriated, or placed in a condition which rendered a return of it inconvenient. So, manufactured articles may be sold to answer a particular purpose. In such cases, the contract is considered executory, and the articles, upon a reasonable trial, within proper time, may be returned, if it is found not to answer the purpose for which it was sold. These principles do not affect the case before us.

There is authority for saying, that between vendor and vendee, an order on a depository is a delivery of goods sold, when the order has been delivered to the vendee.(a)

The other Judges concurring, the judgment is reversed and the cause remanded.

BEACH & EDDY, defendants in error, v. CURLE'S adm'r, plaintiff
in error.

15 Mo. 105.

1. *Practice*.—Leave of the court, extending the time of replying to a set off, working no injury to the opposite party, and not affecting the merits of the controversy, although apparently supported by no good reason, is not such an error, as will induce a reversal of the judgment.
(b)
2. *Variance*.—When the petition describes writings as promissory notes, and it turns out in proof that they are also negotiable, there is no variance, and if the description of a note is silent, as to its bearing interest, when in fact, it does bear interest, the variance is such as to authorize the court to disregard it.(c)
3. *Evidence*.—The books of the plaintiff, having been introduced in evidence by the defendant, it is no error to instruct the jury that they are competent evidence for the plaintiff.
4. *Assumpsit—Discharge*.—If a creditor undertakes to give his debtor employment to enable him to pay the debt and fails in his undertaking, the debtor cannot plead such failure in discharge of his debt.

(a) *Williams v. Evans*, 39 Mo. 201.

(b) Gen'l Stat. of 1865, chap. 165, § 25; *Wagner's Stat.*, p. 1018.

(c) Gen'l Stat. of 1865, chap. 168, §§ 1, 2; *Wagner's Stat.*, p. 1033.

Error to St. Louis Circuit Court.

CROCKETT, for plaintiff in error.

TODD & KRUM, *contra*.

SCOTT, J., delivered the opinion of the court. [115]

The first question in the cause arises from the action of the court below in making up the issues. The statute requires replications to set-offs, to be filed within two days after the filing of the plea, unless the court, for good cause, should extend the time. The replication was not filed within two days from the time of filing the plea, but within the time allowed by law for filing a demurrer or answer to the plaintiff's petition. The defendant has six days for answering; he may at any time within that period file it; if he file it within less time than is required, the plaintiff must, in two days, reply to his set-off. This seems plain under the statute. The leave of the court, extending the time of replying, although it seems unsupported by any good reason therefor, is not such an error as would induce this court to reverse the judgment. It does not appear that any injury was sustained by the defendant, or that the merits of the controversy were at all affected by it. (a)

We are not prepared to say, that the acceptances were required to be filed with the petition, which was in the nature of an assumption for money paid, laid out and expended; but if they were, there was no variance. In the petition they were called promissory notes, and it turns out in proof that they were also negotiable. Where is the variance in this? All negotiable notes are promissory. If the description of the note was silent, as to its bearing interest, when, in fact, it did bear *inter- [* 116] est, the variance was of such a character as authorized the court, under the first and second sections of article eleven of the code, in disregarding it.

We see no objections to the first and second instructions for the plaintiffs. They certainly contain a correct exposition of the law

(a) Arnold v. Palmer, 23 Mo. 414.

applicable to this case. It was not necessary that the court should give the negative instruction, that if the money was not advanced by Beach & Eddy, at the instance of Curle & Scott, that they would find for the defendant. The instructions given, clearly convey to the jury the idea, that unless the money was paid by Beach & Eddy, at the instance of Curle & Scott, no recovery could be had. Moreover, the instruction by the court, at its own instance, sets forth this matter in a way not to be misunderstood by the jury, and perhaps a little too favorable for the defendant. There was certainly nothing in the instruction of which the defendant can justly complain. The third and fourth instructions contain law applicable to the case. It was not necessary that they should refer to any contract or undertaking between the firms of Eddy & Eddy and Curle & Scott. Eddy & Eddy was a different concern from that of Beach & Eddy, and their contracts with Curle & Scott could not affect Beach & Eddy.

The books of the plaintiff having been introduced in evidence by the defendants, there was no error in telling the jury that they were competent evidence for the plaintiffs.

We see no objection to the eighth instruction of the plaintiffs. It is obvious, that no contract between Eddy & Eddy and Curle & Scott, could affect the transactions between Beach & Eddy and Curle & Scott.

The instructions given by the court, at its own instance, are not liable to the objections urged against them. The defendant cannot assume that Beach disclaimed the acts of his partner, Eddy. He is not here complaining that his name has been used in a transaction, alien to his partnership with Eddy. By bringing this suit he has affirmed the acts of his partner, Eddy, and if he is willing to abide by them, it is not for a stranger to interpose any objection for him. The court had repeatedly told the jury, that in order to enable the plaintiff to recover, the money must have been advanced at the instance of Curle & Scott. Under this instruction, had it been advanced at the instance of Eddy & Eddy, the jury must certainly have understood that the verdict should be for the defendant.

The first instruction of the defendant, related to drafts, for the

amount of which no recovery was sought. The second instruction had, in effect, been repeatedly given. If the acceptance of Beach & Eddy *were not at the instance and for [* 117] the accommodation of Curle & Scott, the plaintiffs could not recover.

The third instruction, as to notice to the drawer, was inapplicable to the case, as all the evidence showed that the payment of Beach & Eddy was for the accommodation of Curle & Scott—that there were no funds in the hands of the drawers. From the circumstances in this case, it is clear that Curle & Scott were not entitled to notice. The other two instructions may be considered together. If Beach consented to the use of the name of his firm, to enable one of its members to obtain money on credit, it is not perceived on what principle he would be liable on any contract his partner alone might make respecting the money. It is asked, that if Beach & Eddy can agree, that each partner may use the name of the firm, to raise money for his individual use, why may he not agree as to the manner in which that money shall be repaid. It is certainly competent for Beach & Eddy to make such a contract. But because he lets a member of his firm use the money of the firm in his private concerns, he does not thereby make himself a party to the individual contract. It was the understanding between the Eddys and Curle & Scott, that Beach & Eddy's names were to be used on the paper. In consenting to this arrangement, Curle & Scott must have known that any demand that might accrue to them from a breach of contract, on the part of the Eddys, would not affect the claim of Beach & Eddy against them. The idea of the defendant is, that Eddy in agreeing with Curle & Scott, to use the acceptance of Beach & Eddy, at the same time agreed that the money advanced by them should be paid as was stipulated between the Eddys and Curle & Scott. The evidence does not warrant this view of the subject.

The last instruction does not contain a correct proposition. If one promise to pay a sum of money, and the creditor undertakes at the same time, to give the debtor employment, to enable him to pay the debt, the failure to give the employment cannot discharge the debtor from his obligation. Such a case is not within

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the rule which discharges the promissor where he has been prevented by the act of the promisee, from performing the contract. It may give the debtor a right of action against his creditor for damages, but it is obvious that it would be a violation of justice to permit him to plead such a failure in discharge of his undertaking. It would be assuming that the measure of damages for the breach of such contract, would be equal to the debt, whereas, in fact no damages may have been sustained. Eddy & Eddy undertook to supply coal to Curle & Scott for transportation, that by the profits of such employment, they might pay the [* 118] advances made to them; *and they agreed to wait for such advance until they could thus be returned. There was no time limited for the performance of the undertaking of Eddy & Eddy. They were, it seems, prevented by sickness, from furnishing the coal as soon as they expected. Curle dies—all his plans are frustrated, and suit is brought. On what principle can the recovery of the advances be now resisted?

Judge Ryland concurring, the judgment will be affirmed.

SPRADDLING & KEETON, appellants v. PIPKIN, respondent.

15 Mo. 118.

1. *Administration—Lex loci domiciliar.*—The administration of all the goods of an intestate, wherever situated is to be made according to the law of his domicil. When they are in a different country, they are first applied, under the laws of that country, to the satisfaction of the claims of creditors who establish their claims under its laws; and if there are any of its citizens who claim as distributees, distribution of the assets will be made there. If there are distributees residing in the country of the intestate's domicil, or creditors there whose claims are unsatisfied, the tribunals of the country where the assets are found will direct the surplus to be remitted to the country of the domicil for further administration. Such transfer would complete the administration in the country where the assets were found.(a)
2. *Same—Principal and ancillary.*—The administration granted in the State of the intestate's domicil, is the principal one, and that, in any other

(a) Gen'l Stat. of 1865, chap. 125 § 24. Wagner's Stat, p. 115.

State, is ancillary, and priority in administration has no effect on this question.

Appeal from Jefferson Circuit Court.

JOHNSON, for appellants.

FRISSELL, *contra*.

GAMBLE, J., delivered the opinion of the court. [126]

This is an action of detinue, brought by Pipkin, public administrator of Jefferson county, having charge of the estate of John Keeton, deceased, against Spraddling & Keeton, as administrators of William Keeton, to recover several slaves.

It appears that John Keeton, a citizen of Tennessee, resident in Franklin county, came to the State of Missouri, in 1825, bringing with him some eighteen or twenty slaves, some of whom he employed in mining for lead and others he hired out. When he came to this State he left at his residence in Tennessee, his wife and six children, who had, in their possession, his farm and his household effects. At the time he left Tennessee he was much embarrassed, and as his mining operations in Jefferson county in this State became profitable, he returned once or twice to Tennessee, with money for the purpose of paying his debts. He died in Jefferson county in the fall of 1826, his family still living on his farm in Tennessee. Administration was granted by the probate court of Jefferson county to one Taney, and subsequently the letters were revoked, and administration *de bonis non* was granted on the 15th March, 1827, to William Keeton. The administrator, Keeton, filed an inventory, which embraced the slaves left by the intestate. Before William Keeton obtained the letter *de bonis non*, he had been appointed administrator of John Keeton's estate in Tennessee. In September, 1827, the administrator made a settlement of his accounts in the probate court of Jefferson county, and on the 3rd of November, 1830, he made his final settlement; upon which it appeared, that after paying all demands, there remained a balance in his hands amounting to \$57.62. The record of that court, as given in

[*127] evidence in this case, does not *show any order of distribution or other order, making a disposition of the slaves. It appears that after William Keeton had become the administrator, both in Tennessee and Missouri, and before his final settlement here, he removed the slaves to Tennessee in the year 1827 or '28, and that he hired them for some two years, and accounted to the proper court for the hire, as a part of the assets of the estate. The balance which appeared against him, on his final settlement here, was also carried into his account of the administration in Tennessee and settled there. An order was obtained upon the petition of the administrator to the court of pleas and quarter sessions of the county of Franklin, Tennessee, for the sale of the slaves, for the purpose of paying debts and making distribution. Under this order, a sale was made on the 5th of March, 1830, and not long afterwards, the administrator was in the possession of most of the slaves, claiming them as owner. He made a bill of sale in 1832, purporting to convey eighteen of the slaves to Elizabeth Keeton, widow of his intestate, as slaves which she had purchased at the sale made in 1830 by him as administrator; and upon the same day, she executed another bill of sale by which she conveyed to him ten of the same slaves. It is admitted, by all parties, that the court of pleas and quarter sessions, in making the order for the sale of the slaves, acted without any jurisdiction in the matter, and that the order is utterly void. It appeared that William Keeton made report of the sale to the court which ordered it, and that a general settlement of his administration took place in that court, upon which the amount payable to each of the distributees was ascertained. Receipts were produced upon the trial, given by several of the distributees to the administrator, for their distributive shares, as ascertained upon the settlement in the court of pleas and quarter sessions.

There is, upon the record in this case, a great mass of evidence which was used at the trial, to show that the sale of the slaves made by the administrator in Tennessee, was fraudulent, and that the receipts procured from the distributees, were obtained by fraud. The whole of this evidence, is, in the view of the case

entertained by this court, entirely irrelevant to the questions upon which the cause must be determined. It may therefore be dismissed, with the single remark, that if the question of fraud, in the administrator's sale, were that upon which the case depended, we think the evidence would well warrant the conclusion that fraud existed.

It appeared on the trial, that Pipkin, the public administrator of Jefferson county, was ordered by the county court of that county, on the 5th of August, 1847, "to take charge of and administer the goods and *chattels, property and [*128] effects of the estate of John Keeton, deceased, unadministered by the former administrators of said estate." As William Keeton had removed to this State, and brought with him the slaves which he claimed under Elizabeth Keeton (the alleged purchaser at the sale made by him as administrator), this suit was brought to recover the slaves which had at that time, been sold, and which were afterwards held by him, and also to recover such as were offsprings of the slaves thus held.

At the trial, Pipkin, after showing the order of the county court, requiring him to take charge of the property and effects of John Keeton, remaining unadministered, proved that the slaves, sued for in this action, were the same which were described in the inventory filed by William Keeton as former administrator of the estate in the probate court of Jefferson county, or, were the offspring of such slaves, and that at the commencement of the suit, they were in the possession of the defendants who claimed them as the administrator of Wm. Keeton. As this was regarded as making a *prima facie* case for the plaintiff, the defendants showed the settlement of William Keeton, the former administrator upon the estate of John Keeton, and the fact that he was administrator also in Tennessee; that he had removed the slaves to Tennessee, and had carried, into his administration there, the balance which was found against him here, and also the hire of the slaves. The existence of debts in Tennessee, was also showed. The record evidence also showed the order of sale made in Tennessee, and the settlements made by the administrator in the court of Franklin county, into which was carried the

amount produced by the sale of the slaves. This is all that is necessary to extract from the voluminous record, to show the points upon which the case depends.

From the numerous instructions thrown before the jury, it is exceedingly difficult to ascertain the views of the court upon the law governing the case.

The first instruction given for the plaintiff, informs the jury, that if the slaves in question, came into the hands of William Keeton, as administrator, and they have not been legally administered upon by him, then the title vested in the plaintiff, by virtue of the order of the county court of Jefferson county, and they must find a verdict for the plaintiff. The fifth instruction, given for the plaintiff, informs the jury that there is no evidence before them that the slaves have been administered upon, and the estate of John Keeton divested under the letters granted in Jefferson county.

In the first instruction given for the defendant, the court declared the law to be, that if William Keeton was administrator, both in

Missouri and Tennessee, then, on the final closing of [* 133] *the administration in the State of Missouri, he had the right to take to the State of Tennessee, which was the State of the domicile of John Keeton, the remainder of the property to be administered upon, according to the laws of Tennessee; and in the fifth instruction, given for the defendant, the jury are told that the record from the county court of Jefferson county, is *prima facie* evidence that the affairs of said estate were finally settled and closed in Missouri, before the slaves were taken to Tennessee.

If, on the closing of the administration in Missouri, the administrator was authorized to take slaves to Tennessee, and carry them into his administration there, and if they were taken to Tennessee under that authority, and administered upon there, it is difficult to find any good reason for saying that they have not been fully administered upon under the letters of administration in Missouri. In such a state of facts, the administrator in Tennessee would be invested with all the title to, and power over the slaves, which, by the laws of that State, would belong to the administrator on the slaves that had never been out of the State, and his responsibility would be the same in relation to slaves thus received

from abroad, as if they had been on the farm of the intestate, in Tennessee at the time of his death. If the right of the administrator in Missouri, to transfer the slaves to the administrator in Tennessee, is once conceded, it will follow, as a natural and necessary consequence, that the transfer, when made, is a legal administration of the slaves, which cannot afterwards be questioned by the administrator *de bonis non*.

It is now a settled rule of law, not requiring at this day the citation of authorities to maintain it, that the administration of all the goods of an intestate, wherever situated or found, is to be made according to the law of the land of the testator's domicile. When they are in a different country, they are first applied under the laws of that country to the satisfaction of the claims of creditors who establish their claims under its laws, and if there are any of its citizens who claim as distributees, distribution of the assets will be made there. But, after the claims of creditors are satisfied, and when the distributees reside in the country of the testator's domicile, or there are other creditors there whose claims remain unsatisfied, the tribunals of the country in which the assets are found, will direct them to be remitted to the country of the domicile, for further administration. This rule of comity is acknowledged and enforced by the courts having the control of the assets, not as a rule absolutely obligatory upon them, but as a rule to be enforced, when, in their judgment, the interests of all concerned in the estate *will be advanced by the trans- [* 134] fer. Our legislature has given to this rule, heretofore existing in our unwritten law, the form and force of a statutory enactment; which, while it retains for our courts the discretion necessary to be exercised in such cases, manifests a proper regard for the interests and convenience of the citizens of other States—Rev. Code 102.

In determining whether the assets of a deceased person shall be transferred from the State, the first thing to be ascertained is, where did the intestate have his domicile? In whatever State that may have been, the administration granted there is the principal administration, and that, in any other State is auxiliary. Priority in the administration, has no effect on this question. Mr. Justice

Jackson, in delivering the opinion of the court in *Steven's adm'r v. Gaylor*, 11 Mass. Rep. 263, properly declares the law in this language: "It is true, that such auxiliary administration is not usually granted until an administrator is appointed in the place of the deceased's domicil. But this cannot be a necessary prerequisite, for if so, and it should happen that administration is never granted in the foreign State, the debts due here, under such circumstances, to a deceased person, could never be collected; and the debts due from him to citizens of this State might remain unpaid. The time of granting the respective letters of administration is also immaterial in this case. The administrators in Connecticut, if duly appointed, must collect all the effects of the deceased in that State; whilst the plaintiff will do the like here; and the residue, after paying the debts of the deceased, wherever collected or remaining, must be distributed according to the laws of the State in which the deceased dwelt. If it should appear, upon due examination in our probate court, that Tibbats had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut under the decree of the probate court there."

Without regard, then, to the date of the several letters of administration granted in this case, if it be true that the domicil of John Keeton was in Tennessee, the effects remaining in the hands of the administrator here, after all debts allowed against the estate in the probate court of Jefferson county were paid, would have been distributed here, or ordered to be transmitted to Tennessee for further administration there, as our courts would have judged most reasonable and proper. In the exercise of this discretion, the condition of the estate in the hands of the principal administrator, the existence of debts in Tennessee unsatisfied, and the evidence of the distributees in that State would [* 135] *have had a controlling influence. We have no doubt, that upon any application to our courts, under the facts apparent in this case the slaves in question would have been ordered to be delivered over to the administrator in Tennessee. But the administrator in both States was the same person, and would have

been the proper applicant for such an order of transfer, while at the same time, he would have been the person to resist the application. No such application appears to have been made, and no such order is shown. The transfer, was, in fact, made, and the slaves were taken into the Tennessee administration, and their hire and price accounted for, there; and now the question is presented, whether this act of the administrator in Missouri, can be regarded as a legal disposition of the property finally closing up his administration. It is evident, that this question is, in no degree, affected by the subsequent frauds alleged to have been perpetrated by the administrator in Tennessee, and selling the slaves under the order of a court having no jurisdiction, and being, himself, interested in the purchase. If the transfer of the slaves was an act within the legal competence of the administrator here, it had the effect of giving the title to the administrator in Tennessee, and was such an administration of the property that it cannot now be questioned by the administrator *de bonis non*, in this action of detinue.

It is the opinion of the court, that this record shows a case in which the transfer would have been ordered, and inasmuch as the administrator in Missouri, more than twenty years since, did only what the court, under the circumstances, would have ordered him to do, his act, in making the transfer, completed the administration here upon the slaves, and gave the title to them to the administrator in Tennessee; so that an administrator *de bonis non*, appointed as the plaintiff is, cannot claim them as the property of John Keeton unadministered by the former administrator of Jefferson county. The plaintiff, under his appointment and the order of the county court, is the successor of the administrators appointed by that court, and not of the administrator in Tennessee.

If it be said, that the administrator in Tennessee converted the slaves there to his own use, and then brought them to this State, and that this administration is necessary to enforce the claims of this distributee, it may be answered, that such converting gave to the distributees, at once, a right to proceed against the administrator in the courts of that State, and when he removed to this

State, our courts of equity were open to them, in which to assert their rights and to claim that, notwithstanding the sale made in Tennessee, he was still a trustee for them. There exists no necessity for holding the plaintiff, acting under the order of [* 136] the *county court of Jefferson county, to be the proper party to enforce the rights of the distributees. Their remedy is still open and plain before them. A court of equity is competent to declare that William Keeton was, after the sale, as before, a trustee for them, if it be made to appear, either that there was fraud in the sale, or that he was the purchaser at a sale made by himself as administrator. In such a proceeding the court can give proper weight to all the transactions between the administrator and the distributees, subsequent to the sale, and can take into consideration the acts of alleged ratification of the sale and the circumstance under which receipts and acknowledgments were obtained, and, in short, can adjust the controversy upon the principles which apply to questions between trustee and *cestui que trust*.

It is obvious, that if a direct action of detinue be authorized in such a case as the present, all the transactions between the distributees and the administrator must be rejected from the consideration of the court; for the reason, that the plaintiff, if he could recover at all, must recover by a title, prior in time to the title of a distributee, and, of course, unaffected in law by the acts of the distributees, if they had all acted with the fullest knowledge, and were even at the trial willing to abide by their acts. We think, therefore, that in relation to the alleged conversion in Tennessee by the administrator there, the proper method of reaching the merits of the case, is by a bill in equity, stating the character of the sale, and the fact of the administrator's being the purchaser, or in collusion with the purchaser, and showing such facts as according to the principles of equity would continue his character of trustee, notwithstanding his pretended purchase.

After stating the principles which we think applicable to the case, it is necessary to examine the instructions in detail. It is evident that the circuit court entertained the opinion that the plaintiff, acting under an order of the county court of Jefferson

county, was entitled to dispute the regularity and legality of the administration in Tennessee, and to recover, in this action, any slaves of John Keeton's estate which had not been legally administered according to the laws of Tennessee. It may be useful to state the questions of fact upon which we think the suit must be decided.

1. Was the domicil of John Keeton, at the time of his death, in the State of Tennessee?

2. Was the administration upon his estate in Jefferson county, in this State, finally closed by the payment of all the debts exhibited against the administration?

[* 137] *3. Did the administrator in this State take the slaves to Tennessee and carry them and their hire into the administration there?

If all these questions are answered in the affirmative the plaintiff cannot claim the slaves as any part of the property left unadministered by his predecessors.

The judgment of the circuit court is, with the concurrence of the other Judges, reversed, and the cause remanded to be proceeded in according to this opinion.

REED, plaintiff in error, v. VAUGHAN, defendant in error.

15 Mo. 137.

1. *Bankruptcy—Discharge.*—A certificate of discharge under the bankrupt law of the United States is conclusive evidence in favor of the bankrupt, and may be pleaded as a full and complete bar against all suits for debts embraced within it, unless impeached for fraud.^(a)

Error to St. Louis Court of Common Pleas.

A. H. BUCKNER, for plaintiff in error.

TODD, *contra*.

*SCOTT, J., delivered the opinion of the court.

[* 141]

(a) See Bankrupt Act of March 2d, 1867, § 34.

This cause involves the force and effect of a certificate in bankruptcy, under the laws of the United States. The precise question is, whether a certificate, relied on as a defense against the debt due by the bankrupt, the creditor can impeach by pleading facts which show that the court, by which the certificate was granted, had no jurisdiction of the application for a discharge, even though the facts may appear upon the face of the record which gives the court jurisdiction. The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction, are equally extended to the courts of the United States. In pleading a judgment or decree of one of those courts, there is no more necessity for showing the facts which confer jurisdiction, than in a plea of judgment of the highest tribunal known to the law. Their judgment cannot be impeached for irregularity or error in a collateral proceeding; they can only be vacated on motion, in the courts in which they are rendered, or reversed for error in an appellate jurisdiction. The bankrupt act makes the proceedings in bankruptcy records. The fourth section of that act prescribes, that the discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, &c., and shall and may be pleaded as a full and complete bar to all suits brought in any court of jurisdiction whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt, unless the same shall be impeached for fraud, or some willful concealment, by him, of his property, &c. If it is competent for Congress to enact bankrupt laws, the force and effect of a discharge and certificate, under the laws, may be declared by such enactment. When the statute declares, that a certificate shall be conclusive, of itself, in favor of a bankrupt, unless impeached for fraud, it is equivalent to saying, that nothing, in impeachment of the certificate, shall be pleaded but fraud. The expression of one cause, for its avoidance, is an exclusion of all others. If the words "duly granted" authorize an enquiry into the facts which give jurisdiction to the court granting the certificate, then the law en-

acts the solecism, that a writing may be impeached, but if it is not overthrown in the attempt, then it shall be conclusive. This is a strange sort of conclusiveness. What avail is the conclusiveness to the party, if he is only to have the effect of it after an unsuccessful effort to avoid his instrument? But what authority is there in the law for limiting the *enquiry [* 142] under the words "duly granted," to the facts on which jurisdiction is founded? If it authorizes an investigation into one, it equally authorizes an investigation into all matters in which there may have been irregularity; so the law, in effect, is repealed, and an instrument which is made conclusive evidence of itself, is only allowed its effect after it has successfully resisted all efforts to overthrow it. This view of the effect of a certificate, is not unsupported by authority. In the case of *Rowan v. Holcomb*, 16 Ohio Rep. 463, it was held, that it was not necessary that the certificate should be pleaded, with all the facts and proceedings necessary to give the court jurisdiction. That it is a complete bar to all suits for a debt embraced within it, unless impeached for fraud. The case in 5 Hill's Reports, is disregarded, and the court say, "we do not hold the district court of the United States to be a court of local, limited jurisdiction, in such sense that to give validity to its orders or decrees, as a plea in bar, that it is necessary in the plea to allege all the facts and proceedings necessary to confer jurisdiction. The district court is a court of record, created under the powers of the constitution of the United States, having jurisdiction in matters of bankruptcy by act of Congress. Matters of bankruptcy, by the act, are conferred upon the district court, as part of its general jurisdiction; and on principle, its orders of final discharge may be plead, precisely as the judgments and decrees of any court of general jurisdiction." So, in the case of *White v. How* and others, 3 McLean, 291, the objection was, that the plea did not set out the proceedings under which the bankruptcy was decreed. It was held that the plea was good—that it was not necessary to set out more than the certificate and discharge duly authenticated. The law makes these evidence, and conclusive evidence, unless impeached for fraud. In the case of *Ingalls v. Savage*, 3 Barr 227, it was determined,

that the discharge and certificate are a complete bar when pleaded, unless avoided for fraud. The court says, "the path is thus plainly and distinctly marked for courts, and it would be useless and unwise to wander either to the right or to the left." The cases in New York have been examined, and they seem to be founded on principles, not in accordance with the received law upon this subject. It would seem to be a rule, established in the jurisprudence of that State, "that the jurisdiction of a court, whether of general or limited jurisdiction, may be enquired into, although the record of the judgment states facts, giving it jurisdiction. No court nor officer can acquire jurisdiction by the mere assertion of it, or falsely alleging the existence of facts on which the jurisdiction depends." *Harrington*

v. People, 6 Barbour 607. How many of the proposition, [* 143] *outside of that State, would not be willing to endorse this principle, and as its influence has operated in producing the decisions relied on, those decisions cannot receive the sanction of courts which deny the principles on which they are founded. The case of *Sackett v. Andross*, 5 Hill's Rep., which is mostly relied on, is decided without reference to the provisions of the bankrupt law, in relation to the effect of discharges. In the case of *Ruckman v. Cuvell*, 1 Comstock 505, the opinion of a single judge is expressed. In *Stephens v. Ely*, 6 Hill 607, the opinion of the court is delivered by Nelson, and he kindly refers the pleader to the forms under the insolvent laws before officers in the country, as guides in impeaching the decrees of a court of general jurisdiction. The distinction, taken by the judge, between cases of voluntary and involuntary bankruptcy under the act, it seems is difficult to be maintained. The Congress of the United States had the power to pass the voluntary clause of the bankrupt law. Its authority to do so, has been sustained by the supreme court of the United States. If there is power to pass such a clause, then a power exists to declare the force and effect under it. Now if the law gives the same effect to the certificate, whether obtained under the voluntary or involuntary provisions, and it is admitted to be conclusive and unimpeachable when given under the involuntary clause; on what principle, then, can it be im-

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peached when granted under the voluntary clause? The asserting of such a distinction seems like giving up the controversy.

The point made, as to the manner of serving the execution, cannot be maintained. This was a proceeding in chancery, and the rules established in relation to the preparation of causes for this court, in trials at common law, have never been regarded as applicable to proceedings in chancery.

The conflict of laws in the references, relate to foreign judgments. The other Judges concurring herein, the injunction is perpetuated.

SHEPARD, appellant v. THE BANK OF THE STATE OF MISSOURI,
respondent.

15 Mo. 143.

1. *Constitution—Laws.*—The statute authorizing Courts in certain cases to refer issues of fact to referees is not unconstitutional.(a)
2. *Evidence—Presumptions.*—An account delivered to the party charged therewith, is presumed to be correct if kept for a long time without objection made thereto.

Appeal from St. Louis Circuit Court.

HOLMES & HOLMES, for appellant.

*BUCKNER, *contra*.

[*149]

RYLAND, J., delivered the opinion of the court.

Upon the above statement of facts, the petitioner below, appellant in this court, assigned for error the act of the court below, in referring the case to a referee, and the refusal to set aside the order making the reference; also, the act of the court in overruling petitioner's exceptions to the report of the referee, and in affirming the report and giving judgment thereon for petitioner for \$13.50; and also the act of the court in giving judgment without a jury.

(a) Gen'l Stat. of 1865, chap. 169, §§ 17-19; Wagner's Stat., p. 1041.

This was a proceeding under the new code of practice. The 16th article of the code provides for the appointment of referees. By this article, it is permitted, that all or any issues of law or fact, may be referred upon the written consent of the parties. The court, where the parties do not consent, may, upon the application of either party, or of its own motion, direct a reference, in cases where an issue of fact shall require the examination of a long account on either side, or where the taking an account shall be necessary for the information of the court. The court can appoint one or more referees, where the parties themselves do not agree upon the persons.

The court can appoint a general or special commissioner, to whom matters mentioned in this article, may be referred when the parties do not agree upon referees; who shall have the powers and proceed as commissioners in chancery are required to proceed, and with the [same] effect.

We are inclined to the opinion, that the case before us, was one in which the court might well appoint a referee of its own motion. Here was a long account to be examined: sums of money had been deposited and withdrawn in smaller sums for several years. The items of these transactions were to be looked into, and a good and competent accountant, conversant in [*150] such matters, was better calculated to ascertain the true position of the affairs between the parties, than any jury ordinarily chosen by the ministerial officers of our courts.

The petition claims, that there is no account to be settled, but a single issue of payment to be proved. This payment, however, is founded on a long list of items, extending through several years, and requires as much care and knowledge of keeping and making entries in books, as is necessary in keeping accounts between merchants and others.

Nor do we consider the statute, thus authorizing the court to appoint referees, unconstitutional, as trenching upon the trial by jury. It has ever been the practice of the courts, in somewhat kindred cases, to appoint auditors or referees, to settle accounts; nor has the power ever been seriously disputed before. Without going into a labored defense of this power of the court, under

the present statute, to appoint referees, in cases like the one before us, we will state it as our opinion, that this power is vested in our courts, and that it is not inconsistent with the provisions of our constitution, in trenching upon the right of trial by jury. Its practice often tends to the elucidation of accounts and transactions between man and man, and mainly contributes to the ends of truth and justice. We are not willing, therefore, to put a stop to its exercise, by throwing out doubts of its constitutionality. This settles the case, so far as regards the errors in respect to referees and trials by jury. We rule these points against the petitioner.

Nor do we feel disposed to disturb the case in respect to the exceptions taken to the report of the referees, and to the giving of judgment on the same, for the amount therein mentioned, to the petitioner. We do not say, that there may not be some errors in the proceedings of the referee, but, in our opinion, they do not touch the merits of the controversy, so as to injure, materially, either the petitioner or the defendant. "The supreme court shall not reverse any judgment of the circuit court, unless it shall believe that error was committed, by the circuit court, against the appellant, and materially affecting the merits of the action." Art. XIX, § 17, Prac. Code 1848-9.(a)

This case presents to us this feature: Here, a depositor of a large amount in bank, has been in the habit of drawing on the fund in various ways, for several years; has his bank book, in which the accounts have been kept, showing the debts and credits. This book was balanced on the 1st of April, 1842, and again on the 1st of August, 1846. In this bank book, in which the accounts have been kept, and the entries made by a bank clerk, is the following memorandum: "All the checks from 1st April, 1842, to 1st August, 1846, are taken from the individual ledgers of the bank—the original checks misplaced—the amounts, date, &c., are correct, having [been] [* 151] compared with the books." This was in August, 1846. The petitioner keeps this book, without making any objection, at

(a) Gen'l Stat. of 1865, ch. 135, § 40; Wagner's Stat. p. 1068.

the time, and without making any objection until years have elapsed, so far as appears from the record, when in September, 1849, he brings suit.

The law is well settled, in similar matters, between merchant and merchant. An account handed or sent to a merchant, who keeps it, without any objection being made for a long time, is presumed to be correct. Some judges say, this is conclusive, after two years have elapsed; others hold, that the objections must be made within two or three returns of the post.

It is true, these cases are between merchant and merchant, and are generally found in chancery proceedings; but there is no reason why the same doctrine should not prevail between any other persons, with whom are accounts current or accounts of transactions in the ordinary course of business. There is a presumption of correctness, of fairness and of truth in the account thus kept, which becomes strong and forcible, after the acquiescence of the party charged with it, for months or years. The same reasons, which adopt this rule among merchants, will apply it to banks and their depositors. The same rules of evidence have heretofore prevailed in courts, both of law and equity. We now have no courts of equity, nor any equity proceedings, as formerly practiced; all the distinctions between the proceedings of these courts, have been destroyed, under the force of innovation. This action admits of all defenses; the rules of evidence, therefore, apply in this case, so as to make that a defense here, which formerly was considered one in equity.

"Where one merchant sends an account current to another, residing in a different country, between whom there are mutual dealings, and he keeps that account two years, without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him; at least so far as to cast the *onus probandi* on him:" Freeland v. Haron and others, 7 Cranch, 151.

"A cash account, shown to a defendant, and not objected to by him, is sufficient evidence of his admission to go to the jury:" 1 Serg. & Rawle, 406.

"Amongst merchants, it is looked upon as an allowance of an

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account current, if the merchant, that receives it, does not object to it in a second or third post :” *Sherman v. Sherman*, 2 Vern. 276.

It is the keeping of the account, by the person to whom it is sent, any length of time without making objections, which shall bind him and prevent his entering into an open account afterwards : Lord Hardwicke, *in *Willis v. Jernegan*. [* 152] In this case, the Lord Chancellor said : “Now there is no doubt, if vouchers are delivered up at the time, it is an affirmation, at least, that the account between the parties was a stated one, but to make it so, it is not absolutely necessary that they should be delivered up at the time the account is settled ; for instance, in the case of bankers and their customers, it is seldom done, but the drafts, which are made on them are constantly kept in files, and at different times when they settle accounts with you, they enter in a book, which they give you for that purpose, the several receipts and payments during your transactions with their shops, and it would be imprudent in them to do otherwise ; because, the vouchers are very often of use to them in clearing up any disputes between their shops and a third person :” 2 Atkins. 251. See also *Tickel v. Short*, 2 Vesey Sen., 239. See 2 Walking. C. C. Rep., 390. In this case accounts that had been rendered by Barker & Annesley to the defendants and returned by them without objection, are, it appears, proper to be offered in evidence, as well, and rather better than if Barker & Annesley had, in the presence of the defendants, declared the partnership : the partnership of Barker & Annesley being the point in issue.

Applying this rule, which we think founded in common sense, and is in accordance with the common course of human experience, to the case now at bar, and we come to the conclusion, that the petitioner has no cause of just complaint against the judgment of the court below.

There the petitioner is a customer of the bank, in the language of Lord Hardwicke. He has made his deposits ; he draws, at various times for various amounts. This course of things continues for years. On the 1st of April, 1842, this account between the petitioner and the bank is closed, or balanced : the same course

of procedure still ensues until August, 1846 ; the accounts are again balanced ; the bank book given to the petitioner is kept by a clerk of the bank ; he enters the deposits to the credit of the petitioner ; he enters the checks, notes, &c., of the petitioner, in the same book, to the credit of the bank ; these are closed in August, 1846 ; a memorandum made of the fact, of the correctness of the account ; the examination of the books of the bank ; the account handed thus to the petitioner remains without objection, as we find in the record, for nearly three years ; then suit is brought, and objection made to having the accounts between the parties referred to one competent man as referee, but a jury is preferred ! I am free to say, that no case has ever been presented for my examination, where the above rule of accounts, adopted and practiced by the rules of chancery courts, both of England [* 153] and of the States of this Union, as most conducive to *the promotion of equity and substantial justice in the settlement of accounts between merchant and merchant, can be with more propriety invoked than in the case now at bar.

We therefore affirm the judgment of the court below, the other Judges concurring.

THE STATE OF MISSOURI, respondent v. Mix, appellant.

15 Mo. 153.

1. *Jury—Separation.*—It is not error for the court to permit the separation of the Jury before verdict when both parties consent thereto.
2. *Witness.*—If a witness willfully testify falsely to any material fact in the case, the Jury are authorized to discredit or reject the whole testimony.
3. *Criminal law—Abettor.*—It is not necessary that one should be present actively aiding and assisting in the passing of counterfeit money to constitute him an aider or abettor.
4. *Criminal practice—Error—Instruction.*—Error in the admission of illegal testimony against the accused cannot be cured by an instruction withdrawing such testimony from the jury.

5. *Evidence—Guilty knowledge.*—It is competent, in order to show guilty knowledge in one who had passed a counterfeit bank note, to prove that he had passed other counterfeit bank notes of a similar kind at other times.

Appeal from St. Louis Criminal Court.

BLENNERHASSETT & SHREVE, for appellant.

LACKLAND, *contra*.

RYLAND, J., delivered the opinion of the court.

The defendant, Mix, was indicted with one Dick Smith, alias John Williams, for passing counterfeit bank notes. The defendant severed on the trial.

There was proof tending to show very plainly, that the two indicted, Mix and Williams, were seen in company, at different places; and that Williams would purchase some article of small price, and give a bank note in pay, and receive cash and other notes in change; that these bank notes, so paid by Williams, were counterfeit. This was done at **“Jacoby’s”* [* 157] at *“Dr. Bragg’s store”* and at the *“Commercial Exchange,”* all in the city of St. Louis. That the defendant at one place, in order to make the change, took a plug of tobacco; that is, the person paying the change for the counterfeit note, which he had received in payment, paid over to Mix a plug of tobacco. There was evidence, tending to show that Mix and Williams were together, so that concert of action might fairly be presumed to exist between them.

The jury found the defendant guilty. He moved for a new trial, which being overruled, he brings the case here by appeal. The errors relied upon for a reversal are, that the criminal court erred in giving instructions for the State, and in refusing instructions for the defendant; that it erred in allowing the jury to separate before finding their verdict; that it erred in admitting testimony to the jury, and also, in excluding testimony, and that it erred in refusing to grant a new trial.

We shall not touch the point of the competency of the co-defend-

ant to testify in this case, for the defendant on trial ; this point is before us in the case of the State v. Roberts, and will there be decided.(a)

The point in relation to the separation of the jury, under the facts of this case, as they appear by the record, must be ruled against the defendant. Upon the trial, the court asked, "what shall be done with the jury?" and the counsel of both parties agreed that they might separate, under a charge from the court. This was at the adjournment at noon on the first day ; and such separation continued afterwards at each adjournment of the court, without any exception or objection, for several adjournments, until the attention of the court was called to it, after which the jurors were kept together. The defendant's consent might have well been presumed. If he can plead guilty, I should think he might consent to the separation of the jury. Though, in some cases, it might be prudent for the court not to permit the consent to be given, in cases where minors or slaves are indicted, yet the court might well refuse to act on the consent.(b)

The following are the instructions given for the State :

1. If the jury believe from the evidence that the defendant, William Mix, was in company with Dick Smith, alias Williams, at the time he (Smith) passed the counterfeit money mentioned in the indictment and that he knew the same to be [the] counterfeit money mentioned in the indictment, and that he knew the same to be counterfeit, and if the jury believe that he was sufficiently near to render him assistance, or did aid or abet, or direct said Smith, alias Williams, to pass the same, and that he did so aid, direct and abet, knowing said bills to be counterfeit, [* 158] the *intent to defraud Frederick Jacoby, or the Mechanics & Merchants Bank of Wheeling may be inferred.

2. It is not necessary that the jury should believe that the defendant was actually present when the felony was committed, but if the jury believe that the defendant was in company with Williams and that the said Williams did pass the counterfeit bill

(a) *ante.* p. 28.

(b) State v. Harlow, 21 Mo. 446; State v. Igo, *id.* 459; State v. Weber, 22 Mo. 321; State v. Burns, 33 Mo. 483.

charged in the indictment, and that he knew the said bill was a counterfeit, and that the defendant, though absent at the time, had counseled, procured or abetted the said Williams in the passage of the same; then the said defendant is guilty of being accessory before the fact, and the jury will find him guilty of forgery in the second degree. The court is asked to exclude the part of the evidence of M'Affee, in which he says defendant told him, that he, defendant, had been in the state prison of Kentucky.

3. If the jury believe from the evidence in the cause, that the defendant did pass as true, or that he did in any way aid Williams in passing or in an attempt to pass, the bank note charged in the indictment, and that the defendant did so pass or aid or countenance the passing, knowing it to be a counterfeit, and for the purpose of defrauding as charged, they will find him guilty of forgery in the second degree.

4. If the jury find defendant guilty, as charged in the indictment, they will assess the punishment to imprisonment in the penitentiary for a term not less than seven nor more than ten years.

5. If the jury find the defendant guilty, but cannot agree as to the measurement of punishment, they can return with such a verdict without assessing the punishment.

In lieu of the instruction asked for by the defendant, relating to M'Affee's testimony, the court gave an instruction, in substance, as follows, to-wit:

6. If the jury believe from the evidence, that M'Affee, or any other witness, has willfully and knowingly testified falsely to any material fact in the cause, they are at liberty to reject the whole or any part of the testimony of such witness, which is inconsistent with other truthful evidence in the cause.

The following instructions were asked by the defendant and refused by the court.

7. If the jury believe from the evidence that the witness, M'Affee, willfully testified falsely to any material fact in the case, they are authorized to discredit and reject the whole of his testimony.

8. The court is asked to instruct the jury that to aid, assist or abet another in the uttering or passing of a counterfeit bank

note, is to do something which either gives credit to the [* 159] person or the paper offered, *that a man present when the paper is offered or passed, without saying a word or doing an act is not such aiding and abetting as will make a man subject to conviction.

9. In order to convict the defendant, the jury must be satisfied beyond a reasonable doubt, that the defendant passed, aided and countenanced and published as true, with intent to defraud the bank mentioned in the indictment, or the persons named, knowing that the same was counterfeit, one or more of the bank notes set out in the indictment.

10. The court is asked to instruct the jury, that to make the defendant an accessory before the fact, they must be satisfied that he did something which either gave aid to the person who passed it, or induced those who received it to receive it by some word or act; that his mere presence when the paper is offered or passed without saying or doing anything, is not such a participation as constitutes an accessory before the fact.

11. In order to convict the defendant, the jury must be satisfied *from the evidence* that the bank set out in the indictment was a bank *incorporated* under the laws of the State of Virginia, and that the statute which dispenses with the proof that the same was incorporated by *reputation*.

12. If the jury believe that there is no evidence that the Bank of Virginia was an incorporated bank they must acquit the defendant.

Upon looking over these instructions, the first three, marked as given for the State, seem, at first inspection, to be somewhat loosely and incautiously written. We had much rather have seen the principles declared by them plainly given to the jury. Yet, we will not say that these instructions are erroneous, or that they must have operated to the prejudice of the prisoner.

A few plain propositions, embracing the law upon the facts of the case, are greatly to be preferred, in every case, to a long string of instructions, running into each other, and involved in intricacies, requiring as much elucidation as the facts of the case themselves.

The 4th and 5th instructions, may pass without objection.

The 6th instruction is wrong. It was given instead of the first one asked by the defendant, and it does not fully embrace the point included in the defendant's first. We think the defendant's instruction should have been given, or some one embracing the same principles.(a)

We do not find any point in the action of the court in refusing the other instructions, asked by the defendant. They were calculated to mislead the jury. An accomplice might stand by, watching and guarding his fellow, while engaged in the act of passing the counterfeit money, *without even doing [* 160] an act, or saying a word, at the time. Nay, he might be keeping the watchman's post, at a distance from the scene of operations, and, at the same time, be guilty. This is a crime, after the preparations are made and the funds ready to be used, which may be perpetrated by the assistance of those who, seemingly, at the time, act as strangers to each other. The aid, the abetting, may be given in the dark closet or cellar, or at the different angles of the cross streets. The cunning, crafty devices which they use to impose upon the unsuspecting, are, in the language of one of the witnesses, in alluding to a new issue of counterfeits, "something hard to beat."

The instruction in regard to the incorporation of the bank of Virginia, were properly refused. The testimony of the witness, that the defendant told him he had been in the state prison of Kentucky, under the circumstances on which it was brought out, on the trial below, was improper. It should not have been allowed. The court, afterwards, did all it could to cure the impropriety, by withdrawing it from the jury, but it was wrong to allow it at first; the injury it caused to the defendant, may have been too deeply fixed on the juror's minds to be easily obliterated.(b)

(a) *Gillett v. Wimer*, 23 Mo. 77; *State v. Dwin*, 25 Mo. 553; *State v. Cushing*, 29 Mo. 215; *State v. Stout*, 31 Mo. 406; *State v. Schoenwald*, *id.* 147; *Paulette v. Brown*, 40 Mo. 52.

(b) *State v. Wolff*, *post.* 168; *State v. Schneider*, 35 Mo. 536; *State v. Marshall*, 36 Mo. 402; *State v. Daubert*, 42 Mo. 246.

This principle is confined to criminal cases; see *Knox v. Hunt*, 18 Mo. 174.

Leitensdorfer v. Delphy. 15 Mo.

It was competent to the State to prove, after having proved that the defendant had passed a bank note, which was counterfeit, as charged in the indictment, in order to show guilty knowledge in the defendant, that he had passed other counterfeit bank notes, of a similar kind to other persons, at different times, before and subsequent to the indictment. See the authorities to the point cited in the circuit attorney's brief.(a)

We think the court erred in giving the 6th instruction, in lieu of the defendant's first.

If the law be fairly laid down, in the instructions given to the jury, embracing the whole case, we will not reverse for not giving others, which in themselves may be right.

The judgment in this case is reversed, and the cause remanded ; the other Judges concurring.

LEITENSORFER, appellant v. DELPHY, respondent.

15 Mo. 601.

1. *Equity—Mistake.*—When, by mistake, a contract is not expressed in such terms as to have the force and effect the parties intended, it is the duty of the court to correct the mistake in the instrument; nor is it material whether the instrument is an executory or an executed agreement; nor whether the proceeding is directly, by bill, to correct the mistake, or the mistake is set up in the answer, by way of defense.
2. *Conveyance.*—The word "heirs" in a conveyance is necessary to pass a fee simple.(b)

Appeal from St. Louis Court of Common Pleas.

GANTT, for appellant.

GAMBLE, J., delivered the opinion of the court.

(a) The cases cited are *State v. McAllister*, 11 Shep. (Me.) R. 189; *Thatcher's Crim. Cases*, 293; *id.* 47; *State v. Van Hereton*, 2 Pa. Rep., 672; *Hess v. State*, 5 Ohio 5; *Cone v. Martin*, 2 Leigh. 745; *State v. Antoine*, 2 Const. S. C. Rep., 776.

(b) But see Gen'l Stat. of 1865, chap. 108, § 2; *Wagner's Stat.*, p. 1357.

Fournier, an old inhabitant of Carondelet, conveyed all his property, real and personal, to his son-in-law, Denoyer; the only considerations of the conveyance being the covenant of the son-in-law, contained in the same deed, by which he bound himself to maintain his father-in-law and mother-in-law "during their lives, with good and sufficient food and clothing, in sickness and in health; furnish them with a horse and cart, and give them at all times free access to the property conveyed for their own use so long as they might live, and that during that time he would not convey the property to any other person."

A year after this conveyance, the parties executed another instrument, in which they recite the substance of the previous conveyance, and then say, "which said deed and the covenants therein contained, the said parties find to operate to their prejudice and against their interest, in consideration whereof, as well as for divers other good causes them thereunto moving, the said Francis Denoyer, on his part, hereby abandons, relinquishes, and quits claim to all the property in the aforesaid deed described, unto the said Francis Fournier, and the said Francis and Josette his wife do hereby release and discharge the said Denoyer from the further performance of each and every one of the covenants entered into in the aforesaid deed."

The father-in-law, on the next day after this last instrument was executed, conveyed a part of the same property, but not the property now in question, to his son-in-law Denoyer, by deed with general warranty. Fournier, the father-in-law, continued in possession of the premises in *question for [* 166] some two years, and then sold and conveyed the property, under which conveyance the possession has ever since been held.

The plaintiff claims by deed from Denoyer, the son-in-law, made more than nineteen years after the instrument by which they attempted to rescind the first conveyance; and the whole force of the plaintiff's claim is, that there are no words of inheritance in the re-conveyance from Denoyer to Fournier, and therefore Denoyer retained the reversion after a life estate conveyed to Fournier.

It was plainly the intention of the parties, when the first deed was executed, that the use of the property should be enjoyed by both Fournier and his wife, during their lives, for so is the covenant of Denoyer in that deed. If the re-conveyance, by Denoyer, only vested in Fournier a life estate in the property, it was less than the parties supposed was already in Fournier and his wife, and so, according to this construction of the instrument, Denoyer being entirely discharged from his covenants by plain and effectual words, would get the fee simple in the whole property after the death of Fournier for no consideration whatever. It is the province of a court to enforce the contracts and conveyances of the parties, and not to make or alter them; but it is the duty of the court to enforce the contract which was really made, and when by mistake that contract is not expressed in such terms as to have the force and effect that the parties intended it should have, then it is the clear duty of the court to correct the mistake in the instrument. The supreme court of the United States in *Hunt v. Rousmaniere's adm'r*, 1, Peters 13, say, "there are certain principles of equity applicable to this question, which as general principles we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement."

In the present case, there is no necessity for going out of the instrument executed between these parties, in order to ascertain their intention, in making the second conveyance and the agreement between them which the instrument was designed to execute. They refer to the first conveyance and recite its provisions. It had two parts—the first, the conveyance to Denoyer of all Fournier's property—the second, the covenants of Denoyer to support Fournier and wife, &c. They say in the second instrument as the consideration upon which it was made that
[* 167] *the previous "deed and the covenants therein contained,

the parties found to operate to their prejudice and against their interests," therefore they execute the second. This second instrument relinquishes and quits claim to Fournier all the property, and releases Denoyer from all his covenants. The first deed, as a conveyance of property, could not operate to the prejudice or against the interests of Denoyer; nor did the covenants of Denoyer operate to the prejudice or against the interests of Fournier. But the deed, as a conveyance, operated to the prejudice of Fournier, and the covenants to the prejudice of Denoyer. It is perfectly apparent that the parties had agreed, in order to free themselves from this mutual prejudice, to rescind the instrument which thus injuriously affected the interests of each, and if the terms employed in the second instrument have not the effect of re-instating them in all their former rights, and freeing them from all the burdens imposed by the first, it does not fulfil their intention, because of a mistake in drawing it.

If words of inheritance were necessary in order to re-invest Fournier with the fee simple of the land which had been conveyed to Denoyer, then such words were omitted by mistake. It is not necessary, in order to establish a mistake in an instrument that it shall be shown that particular words were agreed upon by the parties as words to be inserted in the instrument. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention.

The power of a court of equity to reform an instrument, which by reason of a mistake fails to execute the intention of the parties is unquestionable. It is not material, whether the instrument is an executory or an executed agreement; nor is it material whether the proceeding is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense. 2 John. R. 585; 5 John. C. R. 224; *ib.* 184; 10 Conn. 244; 1 John. C. R. 607; 6 Blackf. 448; 1 Dev. Eq. Reports 379.(a)

Although it is said, that the evidence required to prove a mis-

(a) Hook v. Craighead, 32 Mo. 405; Henderson v. Dickey, 35 Mo. 120; Young v. Coleman, 43 Mo. 179.

take when it is denied must be as satisfactory as if the mistake were admitted, yet this and similar remarks of judges, however distinguished, form no rule of law to direct courts in dispensing justice. When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act upon the conviction. (a)

In the present case the evidence is stronger than the testimony of witnesses. It is the language of the parties themselves, in the very instruments executed, and in which the mistake is alleged to exist.

[* 168] *It is to be observed, that the question, whether the word "heirs" is necessary to pass a fee simple is not discussed. It has been so long settled and so often acted upon, that it would be improper to allow it now to be disturbed. Taking that part of the common law to be in force in this State, we do not think that any of the authorities cited by the defendant's counsel, bring this case within any exception to the rule requiring words of inheritance in order to the transmission of a fee. Let the judgment be affirmed.

THE STATE OF MISSOURI, respondent, v. WOLFF, appellant.

15 Mo. 168.

1. *Practice—Criminal trial.*—If illegal testimony has been admitted against the objection of the accused, the error cannot be cured by an instruction withdrawing such testimony from the jury. (b)
2. *Evidence—Possession of stolen property.*—Possession of stolen property, to raise a presumption of guilt, must be recent after the theft.

Appeal from St. Louis Criminal Court.

BLANNERHASSETT & SHREVE, for appellant.

(a) *Able v. Union Insurance Co.*, 26 Mo. 56; *Tesson v. Atl. Ins. Co.*, 40 Mo. 33.

(a) See *State v. Mix*, *ante*, p. 153, and notes thereto.

LACKLAND, *contra*.

RYLAND, J., delivered the opinion of the court. [*171]

This was an indictment against the defendant, Christopher Wolff, and three others. The present defendant was tried and found guilty, and sentenced to the state prison. He moved for a new trial, which being overruled, he brings the case to this court by appeal.

The errors assigned, mainly question the judgment of the criminal court, in giving instructions, and in refusing to give instructions; in admitting improper testimony; in excluding, as incompetent, a co-defendant as a witness for the defendant, and in refusing to grant a new trial.

I will set out the various instructions offered in this case, as well those refused as those given, and give my opinion on them.

There were two counts in the indictment, one for stealing and the other for receiving stolen property.

The property charged to have been stolen, was a quantity of oats in the bundles, and a quantity of window glass. The property charged *to have been received, as stolen, was [*172] of the same kind as that mentioned in the first count, oats and glass.

There was testimony tending to show, that the property stolen was traced to a house occupied by one Pennel, a co-defendant indicted with the present defendant. The property, that is, the oats were found the morning after they were stolen, in the yard at Pennel's house; traced there by the loose straw that had fallen, in the act of being carried along the road, as well as by the impression, or track of the wagon wheels.

When the officers of the law were approaching the house, Pennel and Wolff both ran. Wolff was caught, but the other escaped. When overtaken, Wolff said that Pennel told him to run. There was testimony tending to prove that Wolff was a person who hired himself to work; and that a short time, only, previous to this transaction, he had gone to Pennel's to live.

The great body of the testimony, given in the case, relates to other articles than those mentioned in the indictment. Witness after witness is examined, proving that wagons, wagon wheels,

wagon tongues, bee hives, honey, live geese, jack planes, straw cutters, buggy harness and various other articles, were found at the house where Pennel and the defendant lived. These were taken to the calaboose; to which place the owners came, time after time, and claimed and carried away their property. The defendant objected to the admission of this evidence, but it was admitted and he excepted.

The court, at length, instructed the jury, to disregard all the evidence in relation to any other property than that mentioned in the indictment. The defendant's counsel contends, and we think very properly too, that this instruction has not and cannot do away with the effect that such evidence had on the jurors minds.

Had the State proven, that the property, recently stolen, was found in the possession of the defendant, then there might be some pretext for showing guilty knowledge in the defendant, that the property was stolen, to prove, that in his possession were various other articles of stolen property. But the proof here is, that the house where these things were found, was in possession of Pennel; that defendant was living with him, in all probability as a work hand, and had been living with him but a short time.(a)

It will not do to admit illegal evidence or irrelevant testimony against the accused, in spite of his objections, and after such evidence has had the effect to impress the jurors unfavorably against the accused, to attempt to wipe out the injury by an [* 173] instruction, calling on the jury to *disregard it. It has been said that "evil, in the mind of man, may come and go, so unapproved as to leave no stain behind," but an impression upon a juror's mind, made by illegal evidence, may have a powerful effect, in forcing that mind to an improper conclusion. The *corpus delicti* must be first proved, before such evidence can be admitted—must be first brought home to the defendant. As in an indictment for passing counterfeit money, after it has been proved, that the defendant passed the bank note as charged, and that the bank note was counterfeit, then the prosecution may prove various other acts of passing counterfeit money, in order

(a) State v. Harrold, 38 Mo. 496; State v. Wohlman, 34 Mo. 482.

to show the defendant's knowledge of the fact, that it was counterfeit.

The court gave the following, on its own motion :

1. The jury will disregard all testimony relating to other property than that set forth in the said indictment, which was not proven to be stolen property.

2. If the jury believe, from the evidence, that the defendants, or either of them, did steal, take and carry away any of the property charged as the property of Caspar H. Strantman, of the value of ten dollars or upwards, and that they, or either of them, did so steal for the purpose of converting the same to *their* own use, you ought to find the defendant guilty of *grand* larceny, and assess the punishment to imprisonment in the penitentiary for a term not less than two nor more than five years.

Possession of stolen property, not long after the theft, raises the legal presumption of guilt in the party having such possession, and it is for him to account for such possession, to the reasonable satisfaction of the jury.

3. If the jury believe, from the evidence, that Christopher Wolff did live at the house leased by Pennel, and did at any time either by himself or with Pennel, have possession of the property charged, and if the jury believe that said property was stolen property, the burden is thrown upon the defendant, Christopher Wolff, to account for such possession, to the reasonable satisfaction of the jury.

4. If the jury entertain a reasonable doubt as to the guilt of either of the defendants, you ought to acquit such defendants.

5. If the jury have no reasonable doubt, as to the guilt of the defendants, or either of them, as charged in the first count, but cannot agree as to the measure of punishment, you can find the defendants or either of them guilty, without assessing the punishment.

The following instructions were asked on the part of the defendant, but were refused by the court.

1. The jury are instructed, that the State having [174] elected the first count in the indictment, which charges the defendant with the felonious taking of the property mentioned,

the jury will disregard all evidence of the stealing of any other property, except the property set forth in the indictment, to-wit, oats and glass. The jury cannot, therefore, convict, unless they believe from the evidence that the defendants, or either of them, did steal, take and carry away the property mentioned, from the possession of the owner of the same; and if the jury have a reasonable doubt, as to whether the defendant, or either of them, did actually steal and carry away the property mentioned, they will acquit.

2. If the jury believe that Pennel hired or leased the house in question, and that Christopher lived with him, as a hired man, and that the property mentioned in the indictment was in said house, or in the stable or shed attached thereto, these facts do not, of themselves, prove that such property was in the possession of the said Christopher, and he is not called on to account for such property being there.

The first instruction of the defendant was properly refused, because the State had not, as appears by the record, made any election of the counts in the indictment, on which to rest the prosecution.

The second instruction asked by the defendant, might well have been given, and we think it ought to have been given.

I have already commented on the first instruction given by the court. It was right to give it; it was all the court could do to cure the injury done, but it did not then do away with the error.

The instruction given as number two is wrong in the phraseology in which it was given. This instruction says to the jury, that if they believe that the defendants, or either of them, did steal any of the property as charged, that they must find the *defendant guilty*. We do not suppose that the court intended to charge the jury, that if they believe from the evidence one man guilty, they might convict another and a different one. This is clearly wrong.

The third instruction given is also wrong. Possession of stolen property must be recent after the theft, in order to raise the presumption of guilt. Possession at "*any time*" will not raise the

presumption. "*Any time*" may refer to a period too remote; it must be recent. (a)

We find no fault with the other instructions. The point raised by the rejection of the co-defendant as a competent witness for the defendant, will be noticed in the case of *Roberts v. The State*, now before us, and to be decided at this term. (b)

Upon the whole case then, we think the court erred in admitting the testimony of the witness about other property than that charged in the indictment; that the defendant's [*175] second instruction ought to have been given; that the third instruction ought to have been refused, and that the fourth instruction is wrong in the words "*possession at any time.*"

For these errors, the judgment below is reversed, and the case remanded for further trial; the other Judges concurring.

HARRISON v. RUSH.

15 Mo. 175.

1. *Injunction—Appeal.*—A refusal to grant an injunction is not a final determination of the cause, within the meaning of the statute, and an appeal from it will not lie.

Motion to Dismiss Appeal.

SCOTT, J., delivered the opinion of the court.

This was a motion to dismiss the appeal in this cause, for the reason that there is no final determination of the matter in controversy between the parties.

The appeal having been taken from a refusal of the court to grant an injunction, it must be dismissed. Such a refusal is no final determination of the cause, within the meaning of the statute. The other Judges concurring, the appeal is dismissed.

(a) *State v. Bruin*, 34 Mo. 537; *State v. Gray*, 37 Mo. 463; *State v. Creson*, 38 Mo. 372.

(b) *Ante*. p. 28.

Pond v. Wyman. 15 Mo.

POND, respondent, v. WYMAN, appellant.

15 Mo. 175.

1. *Instructions.*—A judgment will not be reversed for the refusal of instructions, if the instructions given, present to the jury a correct and full statement of the law governing the case.
2. *Same.*—If two instructions, each improper in itself, amount to a correct statement of the law when taken together, the error in each will be disregarded. 8 Mo. Rep. 342.
3. *Contract—Excuse for non performance.*—The defendant's refusal to permit the plaintiff to perform his contract, the latter being in no fault, is regarded as equivalent to a performance for the purpose of maintaining an action upon the contract.
4. *Contract—Measure of damages.*—The contract price is the measure of the plaintiff's damages, unless the defendant by evidence, shows that the damage actually sustained, is less than the price agreed upon.
5. *Damages.*—Rule when defendant prevents plaintiff from performing his contract.

Appeal from St. Louis Court of Common Pleas.

GRAY, for appellant.

TODD and KRUM, *contra*.

GAMBLE, J., delivered the opinion of the court.

The only question for consideration in this case is the measure of damages which Pond should recover upon the contract for the superintendence, stated in the petition; as the other items of claim, for drawing plans, specifications, &c., are not disputed before this court.

Pond entered upon the superintendence of the erection of Wyman's school house, upon a contract, as is alleged, for a specific price, and was prevented from completing the service by Wyman, without fault on his part, although he was ready to perform his contract. The building would have required Pond's services, as superintendent, for more than a year.

The first instruction given by the court of common pleas, tells the

jury that if the contract was made between Wyman and Pond, and that Pond was always ready and willing to perform his part thereof, but that Wyman refused to permit him to do so, without any fault on Pond's part, then Pond is entitled to recover the contract price, and interest thereon, from the completion of the building, unless the defendant has proved that the plaintiff did not actually sustain any damages from said breach of contract.

This instruction certainly does not express the views of the law entertained by the judge who gave it; for in other instructions, that appear to have been given of his own motion, he states the facts by which the defendant might reduce the plaintiff's damages down even to a nominal amount. If this instruction, clearly erroneous in itself, could be regarded as helped by the subsequent instructions, we would not consider it as a proper ground for reviewing the judgment, for it has been declared by this court, that where two instructions, each proper in itself, amounted to a correct statement of the law when taken together, the error in each would be disregarded: *Williams v. Vanmeter*, 8 Mo. R. 342. But in that case, it is also stated, that the two instructions were not contradictory. (a) In the present case, the first instruction lays down a rule for assessing the plaintiff's damages, totally inconsistent with that presented in other instructions, and, as the question before the *jury related entirely to the amount of damages to be re- [* 182] covered, the instructions are contradictory.

It is to be regretted, that the practice so generally prevails, of giving a multitude of instructions to juries, by which the danger of losing the benefit of a just judgment upon the merits, is greatly increased. A judgment will not be reversed for the refusal of instructions, if the instructions given, present to the jury a correct and full statement of the law governing the case. (b)

In examining decided cases, upon the measure of damages recoverable upon contracts like the present, we have had occasion to remark the great flexibility of the law in adjusting the rule to

(a) *Wood v. St. Bt. Fleetwood*, 19 Mo. 529.

(b) *State v. Floyd*, *post.* 349; *Philips v. Smoot*, *post.* 598; *Gamache v. Piquignot*, 17 Mo. 310; *Schnerr v. Lemp*, *id.* 142.

the equity of each case, as it arises, so as almost to leave the case without a rule. It is, apparently, by comparing the instructions given in this case, by the judge on his own motion, with the opinion of Mr. Justice Beardsley, in *Costigan v. Mohawk and Hudson R. R. Co.*, 2 Denis 609, that that case has been taken by the court of common pleas, as furnishing the rule for the measure of damages in the present case. Costigan was employed by the railroad company, to superintend the road for a year, at a salary of \$1500 for the year, together with the use of a dwelling house, worth \$150 per annum. He commenced the services, and after two months had elapsed, he was dismissed, without fault on his part. He gave the company notice of his readiness to complete his contract, but was not allowed to proceed with its performance, and remained wholly unoccupied for the balance of the year. In the opinion of the court, it is first argued, that the plaintiff was entitled to recover the amount of the salary fixed by the contract, and the impression made by this part of the opinion is, that the amount so fixed, is to be taken as the measure of recovery. As the judge proceeds, however, he allows, that the compensation which the plaintiff might have received for other services rendered to other persons, during the time the contract existed, might be taken into consideration in reducing the damages. He also admits, that offers of similar employment, made to the plaintiff during that time, where the employment was to be in the same region, might be shown to reduce the damages, although the plaintiff refused to be so employed.

It appears sufficiently, from the character of the contract, that the whole time of Costigan would have been employed in performing his duties in superintending the railroad, and the application of the rule for the reduction of the damages, either by the proof of his being engaged in other business during the time, or of offers of similar work, which would have occupied the whole [* 183] or a portion of the time, would *not have been difficult.

But, in the present case, we have a contract which would have occupied but a few hours of Pond's time every day, to perform his duties under it; and which is, therefore, compatible with his being employed in other business, during the time contemplated

by the contract. The court of common pleas, having regard to this difference between the cases, has, in the instructions given, required that the defendant should show, either that the plaintiff's time was so occupied in other business that he could not discharge his duties under the contract, or, that offers of similar work were made to him, sufficient to employ all his time; in either of which cases, he would be entitled only to nominal damages. The last instruction given, is designed to allow a reduction below the contract price, by similar evidence; although the plaintiff might have sustained more than nominal damages.

In cases like the present, the general train of decisions, while it makes the refusal of the defendant to permit the plaintiff to perform his contract, equivalent to a performance for the purpose of maintaining the action upon the contract, yet it does not allow it to entitle the plaintiff to a peremptory recovery of the contract price. It makes the contract price the measure of the plaintiff's recovery, unless the defendant, by evidence, shows that the damage actually sustained, is less than the price agreed upon. This, we regard as a sufficient concession to the person who has violated a contract by which he was bound to pay a certain price to another, for services to be rendered. The plaintiff, who has been prevented, by the act of the defendant, from receiving the compensation agreed upon, when he is without fault, is entitled to ask a full indemnity, and the onus of reducing the recovery, is properly thrown upon the defendant. It is almost impossible to lay down any rule for this reduction, that will be comprehensive enough to embrace all cases, and yet be particular and special enough to be of any practical utility. To the extent that the time of the plaintiff, which would be required to perform his contract, has been employed in business, not more laborious, and equally profitable, it is evident that he would not be injured by the violation of the contract. Yet, to give him the full benefit of his contract, he must be entitled to the difference in advantage, in ease and profit, between the service he was to perform, and the business substituted for that service, although his whole time may have been employed. If a portion only of the time was so employed, then the same rule will apply to the reduction for such portion, and the contract price

will furnish the scale of compensation for the time unemployed. But, if for any of the time unemployed, offers of employment, within the range of his general occupation, and in the [* 184] same region, were made *to him, upon reasonable terms, such offers are to be regarded as equivalent to business engaged in and performed, and should have the same effect in reducing the damages. Another fact mentioned in the instructions, as affecting the rights of the plaintiff is, that his time was so occupied as to disable him from performing his duties as superintendent, and it is entitled to consideration. If he were so engaged, under pre-existing contracts, then he ought not to recover more than nominal damages, for it would be unreasonable to permit him to make an engagement with the defendant which would expose the defendant to the constant danger of great injury in the work done upon a valuable building. If his engagement was under contracts, subsequent to that with the defendant, the effect upon his claim for damages has already been stated.

It will be seen, that we depart from the rule stated in the opinion of Mr. Justice Beardsley, as the law in New York, and this is done, because we think the rule is not stated with the precision with which rules for the government of juries should be laid down, and because we differ from that court in regard to the effect of some facts which ought to influence the measure of damage. To say that certain offers of employment "might have furnished a ground for reducing the recovery below the stipulated amount" does not, in our judgment, form a sufficiently clear rule for ascertaining the measure of damage. We give force to the offer of employment, when it is within the line of the plaintiff's occupation, without requiring that it shall be similar to that contracted for. (a)

The judgment is reversed and the cause remanded, with the concurrence of the other Judges.

(a) *Dean v. Ritter*, 18 Mo. 182; *Schnerr v. Lemp*, 19 Mo. 40; *Nearus v. Harbert*, 25 Mo. 352; *Ream v. Watkins*, 27 Mo. 516; *Steinberg v. Gebhardt*, 41 Mo. 519.

Harlow v. Sparr. 15 Mo.

HARLOW, plaintiff in error v. SPARR, defendant in error.

15 Mo. 184.

1. *Auctioneers—Commissions.*—An auctioneer to whom commissions are due has a right to allow to a purchaser at the auction sale credit on his purchase to the amount of his individual debt to such purchaser not to exceed the amount of such commission.

Error to St. Louis Court of Common Pleas.

*TODD & KRUM, for plaintiff in error.

[* 186]

FIELD, *contra*.

RYLAND, J., delivered the opinion of the court.

From the above statement, the question for our adjudication involves the right of an auctioneer, to whom commissions are due for his services in selling goods, to appropriate so much of the money, arising on the sales, as may be due to him for his commissions, to the payment of his individual debts to a purchaser at such sale.

The authority of an auctioneer, to collect the money due on his sales, to sue for it, receipt for it and discharge an account against the *purchaser thereof, is fully main- [* 187] tained by the authorities cited in the brief of the respondent. In the case cited, 1st Henry Blackstone's Rep. 81, the court held, that an auctioneer, employed to sell the goods of a third person, by auction, may maintain an action, for goods sold and delivered, against a buyer, though the sale was at the house of such third person, and the goods were proven to be his property. Lord Loughborough said, that "an auctioneer had a special property in him, with a lien for the charges of the sale, the commission and the auction duty, which he is bound to pay." Heath, Justice, in this case said: "It is the same thing, whether, goods be sold on the premises of the owner, or in an auction room: the possession is in the auctioneer, and it is he who makes the contract. He has special property in them."

Story lays down the law to be, that when a factor or other agent has a lien for advances, or otherwise, to the full extent of

Darrah & Pomeroy v. Steamboat Lightfoot. 15 Mo.

the price or value of goods sold by him, he is entitled to receive payment of the proceeds from the purchaser, not only in opposition to his principal, but in opposition to his assignees, in case of bankruptcy. If he is indebted to the purchaser of the goods, he may set off the one debt against the other, with the assent of the purchaser; and it will be a complete payment and extinguishment of the price, so as to bar any action therefor, by the principal or his assignees: Story on Agency.

In the case at bar, the auctioneer had, in our opinion, the right to collect the purchase money from the defendant, Sparr, or to settle with him, and to allow him credit on the purchase of the goods, not to exceed the commission due to the auctioneer on the auction sales, and such allowance, settlement and payment will be a complete bar to the present plaintiff's right to recover.

The judgment of the court of common pleas, is, with the concurrence of my brother Judges affirmed.

DARRAH & POMEROY v. STEAMBOAT LIGHTFOOT.

15 Mo. 187.

1. *Pleading—Demurrer.*—A demurrer does not admit the items of an account set forth in a petition. If judgment be given on demurrer to such a petition, and the defendant refuses to answer, an inquiry of damages becomes necessary.^(a)

Appeal from St. Louis Circuit Court.

HUDSON, for appellant,

KASSON, *contra*.

[* 190] *RYLAND, J., delivered the opinion of the court.

The only point necessary for us to notice, is the act of the court below in giving the final judgment.

After deciding the demurrer in favor of the petitioners, and giving time to the defendant to answer, which the defendant neg-

(a) Gen'l Stat. of 1865, chap. 171, § 10; Wagner's Stat., p. 1053.

lected to do, the court gave judgment for the petitioners by *nil dicit*, and assessed the damages to the amount of the balance of the account due, as appears by the same in the petition, and interest thereon, making in all the sum of \$122.03, without any proof of the items of the account claimed in the petition.

This we think was error. The court after the failure of the defendant to answer, very properly gave the judgment by default *nihil dicit*, and if it had required the petitioners to make proof of their demand, and on proof had rendered final judgment for the amount so proved, this court would not have interfered.

We see no force in the appellant's objection about the neglect of an order to have the damages enquired into and assessed at the same term; and without such order, the enquiry must not be made until at the next term. All this is rendered necessary by the provisions of the act of 1848 and 9, commonly called the new code, the provisions of which, we apply to the proceedings in this case.

We do not consider that the demurrer admits the items of an account set forth in the petition, so as to do away with the necessity of proof. If the judgment be given on demurrer to such a petition, and defendant should refuse to answer, an enquiry of damages becomes necessary, and this enquiry may be had before the court, if the petitioners waive a jury, or it may be before a jury: See code of practice, Art. XII, § 2.

We reverse the judgment of the court below, so far as respects the enquiry of damages only, and we require the court to take proof of the petitioner's accounts before a jury, unless the petitioners waive a jury, in which event, the court is itself, to take the evidence and assess the petitioner's damages upon the judgment by default, which remains undisturbed.

This case is, therefore, remanded to the court below for further proceedings in accordance with this opinion, the other Judges concurring.

Garneau v. Herthel. 15 Mo.

GARNEAU, respondent, v. HERTHEL, appellant.

15 Mo. 191.

1. *New trial—Verdict against evidence.*—The supreme court will not interfere with a judgment, upon the ground, that the verdict is against evidence, or against the weight of evidence.^(a)
2. *Damages.*—A person who employs the slave of another without the master's permission, to perform labor for him, which exposes the life of the slave to danger, must bear the consequences of such engagement; and if the slave is killed by the effects of the business or employment in which he has been engaged, without his master's permission, the person so employing him, must pay his value to the master.

Appeal from St. Louis Court of Common Pleas.

WRIGHT, for appellant.

TODD & KRUM, *contra*.

GAMBLE, J., delivered the opinion of the court.

The only questions submitted for our consideration are, whether the court of common pleas erred in refusing to grant the defendant a new trial, on the ground that the verdict was against the weight of evidence; and in overruling his motion in arrest of judgment.

The court has become entirely satisfied that the exercise of the power of revising the actions of the different courts of original jurisdiction, upon motions for a new trial, on the ground that the verdict is against evidence, or against the weight of evidence, would often produce great injustice. All persons, familiar with trials, must know that it is utterly impossible to bring before this court, upon paper, a real representation of the trial as it took place. The manner, the temper, the character of witnesses, as known to the jury, cannot be spread upon paper; and the words of a witness, in whose testimony neither the jury nor the court had the slightest confidence, will read as well, and appear entitled to the same consideration when written upon the record,

(a) Gen'l Stat. of 1865, chap. 172, § 3; Wagner's Stat. p. 1058.

as would the *language of the most impartial upright [*193] witness in the world. We cannot suppose that the courts, trying causes, are deficient in the firmness necessary to set aside verdicts when they are found, either under the influence of prejudice, or are opposed to the weight of the evidence. We have the confidence which the law entertains, that the judges, attending to the trials as they progress before them, will freely apply the remedy of granting a new trial, in every case where injustice is done by a verdict, found either without evidence or contrary to the weight of evidence. From these considerations, this court will decline interfering with a judgment, upon the ground, that the court rendering it, has granted or refused a new trial, because of the verdict's being against evidence, or against the weight of evidence.(a)

The motion in arrest of judgment, was properly overruled. A person who employs the slave of another, without the master's permission, to perform labor for him which exposes the life of the slave to danger, must bear the consequences of such engagement; and if the slave is killed by the effects of the business or employment in which he has been engaged without his master's permission, the person so employing him must pay his value to the master. The petition sufficiently charges the fact, that the death of the slave was the consequence of the particular employment in which the defendant, without his master's permission, had engaged him.(b)

The judgment is, with the concurrence of the other Judges, affirmed.

(a) *State v. Cruise*, 16 Mo. 391; *State v. Anderson*, 19 Mo. 241; *Thompson v. Russell*, 30 Mo. 498; *State v. Burnside*, 37 Mo. 243; *Blumenthal v. Torrini*, 40 Mo. 159; *State v. Mansfield*, 41 Mo. 470; *Fangman v. Hersey*, 43 Mo. 122; *Easeley v. Elliott*, *id.* 289; *Gillespie v. Stone*, *id.* 350.

(b) *Johnson v. St. Bt. Arabia*, 24 Mo. 86.

Kelly v. Dickinson et al. 15 Mo.

KELLY, respondent, v. DICKINSON et al. appellants.

15 Mo. 193.

1. *Maritime law—Power of Master.*—The captain of a boat as such, has no right to sell the boat or any part thereof, without special authority therefor from the owners.

Appeal from St. Louis Court of Common Pleas.

KASSON, for appellants.

GANTT, *contra*.

SCOTT, J., delivered the opinion of the court.

This seems a very hard case, when it is considered that Darrah & Pomeroy are the only parties against whom a judgment has been rendered. Dickinson, who really wronged the plaintiff, is now no longer a party to the record. The case of Robinson v. Campbell, 8 Mo. Rep., 365, is not applicable. That case only declared the strict rights of a mortgagee of personal property after a forfeiture, if he saw proper to assert those rights against a mortgagor. The question then is, who was the owner of the boat in the sense that would make him liable for the acts of his agent, the captain? Dickinson, the mortgagor, who was in possession of the boat and commanded her, and who made the contract with the plaintiff, Kelly; or Darrah & Pomeroy, who were the mortgagees; entitled to a portion of the profits of the boat in discharge of their mortgage debt, taking a concern in her well doing on that account, and receiving a statement of her earnings? Without, how-
[* 198] ever, going *further into the matter, we are of opinion, that the court erred in refusing that instruction, asked by the defendants, which declared that the captain of a boat, as such, has no right to sell the boat or any part thereof, without special authority therefor from the owners. The instructions given did not supercede the necessity of giving this one. The evidence, as it appears on the record, clearly shows, that the captain, as such, by no usage or custom was authorized to sell the bar of a boat so as to give to the vendee an interest in the boat itself as part owner. Such a usage would be unreasonable, nor is it a pow-

er necessary to the captain in the discharge of his duties to the owner. It might be a great injury to a boat that a bar keeper had a permanent interest in her, so that he could not be controlled by the owner. It would be in his power to destroy her reputation as a passenger boat and there would be no remedy. The captain, as such, may employ a bar keeper, or grant the privilege of keeping a bar, so long as he is concerned with the boat. But in such cases, the bar keeper is on the footing of others engaged in her service, and must be under that supervision, entrusted to the captain for the benefit of all who are interested in the boat. This is a sufficient quantum of power to the captain, to enable him to discharge his duties to his employers, and it would be unsafe to the owners to countenance the exercise of any authority by the captain, which is not necessary to a full performance of the duties imposed on him.

The other Judges concurring, the judgment is reversed and the cause remanded.

EDDY & Co., appellants, v. STURGEON, respondent.

15 Mo. 198.

1. *Guaranty*.—Wilson purchased of Eddy & Co. \$617.35 cents worth of goods, and Sturgeon by a written guaranty, bound himself to pay, or see that Wilson paid, four hundred dollars of the amount, within ninety days. Wilson, within ninety days, paid two hundred dollars, and it was held that it extinguished Sturgeon's guaranty that amount.

Appeal from St. Louis Court of Common Pleas.

HILL and TODD & KRUM, for appellants.

*SPALDING, *contra*.

[* 202]

RYLAND, J., delivered the opinion of the court.

This action is founded on a guaranty, and the question before us arises on the construction of the instrument, which is as follows, viz:

"ST. LOUIS, May 23d, 1849.

Wm. P. Wilson has this day purchased of R. S. Eddy & Co., six hundred and seventeen dollars and thirty-five cents dry goods. And I bind myself to pay to said R. S. Eddy & Co., or see that said Wilson does, the sum of four hundred dollars, within ninety days from this date, to said Eddy & Co.

I. H. STURGEON.

W. P. WILSON."

[* 203] *The court of common pleas construed this guaranty so as to consider all payments made by Wilson, within the time, as payments in discharge of the amount guarantied by Sturgeon, as will be seen from the following instruction given to the jury, and which forms the principal ground of complaint by the appellants.

"All collections that have been made by the plaintiffs on the whole debt mentioned in said guaranty, if any have been made, and also all payments which have been made either by Wilson or Sturgeon on account of the same, if the jury find that any have been made, are to be applied to the credit of the defendant in this action, in satisfying the whole or any part of said sum of \$400, for which he bound himself by his guaranty."

The plaintiffs contend that they have the right to place the money received of Wilson, which was about \$200 (received within the ninety days), to the discharge of that portion of the debt of Wilson not included in the guaranty. The defendant contends that any money paid by Wilson for this debt must be counted as part of the \$400, which he guarantied to pay or see that Wilson paid.

Let us examine this guaranty, and see what was the obligation thereby imposed upon the defendant. Wilson bought of Eddy & Co., six hundred and seventeen dollars and thirty-five cents worth of goods, and Sturgeon says, "I bind myself to pay to said Eddy & Co., or see that Wilson does, the sum of four hundred dollars, within ninety days from the date."

Now suppose Wilson had paid to Eddy & Co. four hundred dollars on the purchase he had made, within ninety days, and said nothing about the application of the payment, and Eddy & Co.

had thereupon applied the amount necessary to extinguish the \$217.35, first, and had then given credit for the balance on the guaranty, and then sued Sturgeon on the guaranty, could not Sturgeon discharge himself from the guaranty by showing that Wilson had paid the \$400 to Eddy & Co.? By the terms of this guaranty, it is clear that Sturgeon was to pay or see that Wilson paid to Eddy & Co., four hundred dollars of this bill for the purchase of the goods. The instrument between the parties says upon its face, Wilson has purchased of R. S. Eddy & Co., \$617.35 worth of goods. "And I bind myself," says Sturgeon, in the same instrument, "to pay said Eddy & Co., or see that Wilson does, \$400, within ninety days from date." Now any payment, made by Wilson upon this purchase, must, under the terms of the guaranty, be considered as so much for which Sturgeon bound himself either to pay or see that Wilson paid; and it matters not how Eddy & Co. disposed of the amount received, *whether [* 204] as a credit to the \$217.35, or otherwise; for Sturgeon is bound only to pay or see that Wilson pays the \$400.

The construction we give to the guaranty in this case, enables us to determine it without noticing the numerous authorities in relation to the proper application of money, on payments made; without any directions how to apply it at the time.

Courts of justice are not inclined to extend the meaning of terms used in a guaranty, or, by amplifying such meaning, increase the extent of the obligation.

We come to the conclusion, therefore, the construction given to the terms of the guaranty in this case, by the court of common pleas, was the correct one. Judge Gamble concurring herein, the judgment below is affirmed.

HILL, defendant in error, v. McPHERSON, plaintiff in error.

15 Mo. 204.

1. *Partnership*.—If a firm executes a note to one of its members, he cannot sue on it, at law, nor can his assignee. The assignment cannot create a right to sue, when the assignor has no such right.(a)

Error to St. Louis Circuit Court.

TODD & KRUM, for plaintiff in error.

[* 206] *HILL, *pro se*.

RYLAND, J., delivered the opinion of the court.

From the facts appearing by the statement above, the question arises whether an assignee of a non-negotiable note can maintain an action at law against the makers of the note, when the assignor himself, could not.

That White, the assignor and payee of the note, which is not negotiable, being himself, one of the firm of McPherson & Co., the makers of the note, could not, at law, maintain an action on this note against the makers: that is, that he could not be both plaintiff and defendant in the same suit at law, is a proposition that does not now require the citation of authorities to support it.

Does his assignee stand in a better attitude? Sec. 4 of the statute concerning bonds and notes, Digest of 1845, page 194, declares, "that the nature of the defense of the obligor or maker shall not be changed by the assignment, but he may make the same defense against the bond or note, in the hands of the assignee that he might have made against the assignor.

[* 207] *The defense, mentioned in this section, may be one of law or of fact. It may exist alone in the incapacity of the plaintiff legally to sue, and such, we think, is the case now before us. We cannot see how the assignor, who could not sue himself, can give, by his assignment, power to the assignee to sue. The same defense is given against each, and the existence of the same

(a) Gen'l Stat. of 1865, chap. 87, § 7; Wagner's Stat. p. 270.

The State v. Batchelor, State v. Kitchen, and State v. Wall. 15 Mo.

legal defense to the one, sufficient to defeat his action, must have the same effect against the other.

We, therefore, reverse the judgment of the court below, my brother Judges concurring herein.

THE STATE OF MISSOURI v. JOHN BATCHELOR,
and

THE STATE OF MISSOURI v. SOLOMON G. KITCHEN,
and

STATE OF MISSOURI, appellant, v. WALL, respondent.

15 Mo. 208.

1. *Practice—Bill of Exceptions.*—It does not follow that every motion made in a cause becomes part of the record, because the clerk, in copying the proceedings, may insert it. It must be made a part of the record by a bill of exceptions.

Appeal from Stoddard Circuit Court.

LACKLAND, for the State.

ENGLISH, *contra*.

RYLAND, J., delivered the opinion of the court. [209]

The defendant, Richard Wall, was indicted by the grand jury of Stoddard county at the September term of the circuit court, 1850, for practicing law for a livelihood, without first having obtained a license therefor, under the statute passed in February, 1847, entitled an "act to sustain the credit of the State."

The defendant appeared and moved the court to quash the indictment; which motion was sustained, and the circuit attorney excepted to the opinion of the court, but filed no bill of exceptions, and afterwards brings the case to this court by appeal.

That indictments may be sometimes quashed for causes not appearing on their face, see Gallison's Reports, 364; 1 Chitty's Criminal Law, p. 319 (in note); State v. Cain & Price, 1 Hawk's Reports, 352. It is proper that the action of the court

Tagart, adm'r of Slone, *v.* The State of Indiana. 15 Mo.

and the grounds thereof be made part of the record by bill of exceptions.

It does not follow that every motion made in a cause becomes part of the record, because the clerk in copying the proceedings should insert such motions: See *United States v. Gamble & Bates*, 10 Mo. R., 457.

There being no bill of exceptions in this case, we will not disturb the judgment of the court below. My brother Judges concurring herein, the judgment is affirmed. (a)

JOHN TAGART, administrator of SLONE, *v.* THE STATE OF INDIANA. (b)

15 Mo. 209.

1. *Limitations*.—Where the plaintiff and defendant were non-residents of this State, at the time of contracting a debt, and the defendant afterwards removed to this State, the statute of limitations did not begin to run in his favor, until he came into this State: *King v. Lane*, 7 Mo. Rep., 241.

Appeal from Jefferson Circuit Court.

FRISSELL, for appellant.

BEAL, *contra*.

[* 211] *RYLAND, J., delivered the opinion of the court.

This was an action upon a penal bond for six hundred dollars, in favor of the State of Indiana, conditioned for the payment of three hundred dollars on the 6th of April, 1838, by Wil-

(a) *St. Louis v. Milligan*, 18 Mo. 181; *Christy v. Myers*, 21 Mo. 112; *Woods v. Mosier*, 22 Mo. 335; *London v. King*, *id.* 336; *State v. Shehane*, 25 Mo. 565; *Parker v. Waugh*, 34 Mo. 340.

As to what the bill of exceptions should contain, see *Dougherty v. Whitehead*, 31 Mo. 255.

As to distinction between matter of exception and error, see *Bateson v. Clark*, 37 Mo. 31.

(b) *King of Prussia v. Kuepper*, 22 Mo. 550.

liam Dixon, Peter Johnson and John Slone. Dixon appears to be principal and Johnson and Slone securities.

The bond was exhibited for allowance on the 19th day of September, 1849, and was allowed against Slone's estate at the September term, 1850, of the Jefferson county court. An appeal was taken to the Circuit Court, where judgment was again given against the estate, and the case is now brought before this court by appeal.

The defendant relies upon the statute of limitations. All the interest was paid up to the 11th of April, 1841, and also a part of the principal, by Dixon. Upon the facts saved by the record, it appears that Slone left the State of Indiana in March, 1840, in good circumstances, and removed to the State of Missouri; that his removal was open and notorious, and that the agent of the State of Indiana, in making the loan for which the bond in this action was executed, was present when Slone started, and knew where he was going.

A motion was made for new trial, on the ground of erroneous instructions given by the court, and because the judgment was contrary to law. This motion was overruled and excepted to. The court tried *the cause without a jury. [* 212] The instruction complained of by the defendant, is in the following words: "That where plaintiff and defendant were non-residents of this State at the time of contracting the debt, and the defendant removes to this State, the statute of limitations does not begin to run in his favor until he comes to this State."

The question here presented to the court is the same as that decided by this court in the case of *King v. Lane*, 7 Mo. Rep. 240. The counsel for the defendant below, appellant here, insists upon a review of that decision, and contends that the clause in our statute of limitations, on which he rests his defense, was not with due consideration, properly construed by the court.

Let us see this clause—Statute of limitations, art. II, sec. 7, Digest of 1835, page 394. "If at the time when any cause of action, specified in this article, accrues against any person, he be out of this State, such action may be commenced within the times herein respectively limited, after the return of such person into

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the State, &c.”(a) This provision did not originate in our legislation; a similar one is found in the limitation statute of New York, passed in April, 1801. That section reads thus, “and if any person against whom any cause of any action shall accrue shall be out of this State at the time the same shall accrue, the person who shall be entitled to such action shall be at liberty to bring the same within the times respectively above limited, after the return of the person so absent into this State.” And New York copied this provision substantially from 4th Ann. chap. 16, section 19, which is as follows: “That if any person or persons against whom there is or shall be any such cause of suit or action, (here follows a list of actions which I omit) be, or shall be at the time of any such cause of suit or action, given or accrued, fallen or come, beyond seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons, after their return from beyond seas; so as they take the same, after return from beyond seas within such times as are respectively limited for the bringing of the said actions before by this act, &c., &c.

The case of *Duplien v. De Rouex*, which is cited by the court in the case of *King v. Lane*, was determined by the Lord keeper at Hilliary term, 1705. In this case the Lord keeper used the following language: “It is plausible and reasonable that the statute of limitations should not take place, nor the six years be running, until the parties come within the cognizance of [* 213] the laws of England; but that must be left to the *legislature.” In the same year, 1705, the 4th Ann. chap. 16, was passed by the parliament.

The case of *Ruggles v. Keeler* was decided in 1808. In this case, Kent, Ch. Just., says: “But a proviso in the statute of Ann, and which we have adopted in our act of limitations, saves the operation of the statute if the party shall be ‘out of the State’ at the time the cause of action arises against him, and the statute does not begin to run until after the return of the defend-

(a) But see Gen'l Stat. of 1865, chap. 191, § 16; Wagner's Stat., p. 919.

ant." Whether the defendant be a resident of this State, and only absent for a time, or whether he resides altogether out of this State, is immaterial. He is equally within the proviso. If the causes of action arose out of the State, it is sufficient to save the statute from running in favor of the party to be charged until he comes within our jurisdiction. This has been the uniform construction of the English statutes, which also speak of the "return" of the party so absent from beyond seas. The word "return" has never been construed to confine the proviso to Englishmen, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners, who always reside abroad."

In the case of *Tupper v. Nash*, 1 Caine's cases 402, the supreme court of New York decided, that they were bound to confine themselves to their own statute of limitations, and could not regard that of any other State. "Statutes of limitation (said the court) are municipal regulations, founded on local policy, which have coercive authority abroad, and with which foreign or independent governments have no concern."

In the case of *Dwight, adm'r. v. Clark*, 7 Mass. Rep. 515, the action was on several promissory notes; the defendant plead non-assumpsit *infra sex annos*. The replication alleges, in substance, that at the time the cause of action accrued, the defendant was without the limits of this commonwealth; that he had left therein no property or estate that could by ordinary process of law be attached; and that he did not return into the commonwealth until six years before the commencement of this action. The rejoinder alleges, in substance, that the defendant did not return into the commonwealth, not having been an inhabitant thereof, but an inhabitant of another State. To this there was a general demurrer and joinder thereto. The question is whether the period of limitation commenced previous to the defendant's coming into the State. The court say, "we all think the case comes clearly within the exception; the replication states the very case, in all its parts, expressed in the act to constitute an exception. The defendant was without the limits of the commonwealth; nor did he leave any *property within it, that could be [* 214]

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attached. But it is said that by the words "leave" and "return" used in the act, it is evident, that the legislature intended to confine the exception to the inhabitants of the commonwealth. We all, however, think it a much more reasonable construction, that the exception was intended as general, and comprehending all persons who are without the commonwealth and have not attachable property within it, so that the statute shall not begin to run until the defendant is either by his property or his person subject to original process.

This statute of Massachusetts is much stronger in favor of the views of the appellant's counsel in the case before us than our act of 1835. Here is not only the word "return" into the commonwealth, but the words "leave property, &c.," a much stronger expression to include the idea of inhabitation, removing or going out of and returning again into the commonwealth. Yet the court upon solemn agreement adjudged the proviso to have a general meaning and extent to all persons non-residents of the commonwealth, and who have no attachable property therein.

In the case of *Tisson v. Bicknell*, 6 New Hampshire, 557, the construction of the statute of limitations of the State of New Hampshire came before the supreme court of that State. The third section of that act declares, "that if at the time the cause of action occurred or afterwards, the defendant resided without the limits of the State and did not leave property or estate therein, that could by the common and ordinary process of law be attached, the plaintiff shall be at liberty to commence his action, within six years after the cause of action, exclusive of the time during which the defendant shall have resided without the limits of the State as aforesaid;" Richardson, Ch. Jus., in delivering the opinion of the court, said: "But it is contended, that as the defendant was never an inhabitant of this State, the case is not within the third section of the statute. It is argued that the statute embraces only inhabitants of this State, who have gone abroad, and left no property, that could be attached. The statute speaks of their leaving property, which certainly gives some countenance to the supposition, that the case of inhabitants leaving the State was in the immediate contemplation of those who made the act. But

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that circumstance is much too slight to sustain a construction so narrow as that for which the defendant's counsel contends. Upon a similar exception in the statute of Massachusetts it has been decided, that the exception embraces those who were never resident in the commonwealth," and refers to the case of *Dwight, adm'r v. Clark*, above cited in this opinion, and to 11 Pick. 39.

This decision is in strict accordance with other de- [215] cisions in analogous cases; 17 Mass. Rep. 180; *Wilson v. Appleton*, 14 Mass. Rep. 203; *Hall v. Little*, 3 Wilson 145; 2 W. Blacks. 723; 10 Johns. 465.

These decisions of the courts of England, Massachusetts, New York and New Hampshire, upon statutes similar to ours (and, indeed, some of the statutes holding out the idea of inhabitancy, much stronger than ours) have, and I think deserve to have the weighty consideration of this court upon the question before us. I do not feel authorized or disposed to overturn a former decision of this court, supported, as it is, by such authority.

The statutes of limitations of other States, will not be enforced here; our own statute must govern. See 3 Conn. R. 472; *Medbury v. Hopkins*, 4 Conn. 47; *Atwater's adm'r v. Townsend*, 3 Johns. Chan. Rep. 97; *Deconche v. Savetier*, 1 Gallison's Rep. 376; 2 Mass. Rep. 84; 17 Mass. Rep. 55; 1 Harris and Johns. Rep. 453; 4 Cow. 508, *Andrews and Jerome v. Heriot*.

From a review of many cases upon this subject, I am unwilling now to overturn the construction of the statutes of limitations as given by the court in the case of *King v. Lane*.

The case of *Martin, adm'r v. Bates* in 13 Mo. R. does not conflict with this view. Another and different subject matter was before the court in that case.

The statute of limitations did not, from the facts in this case, afford the defendant below a bar to the plaintiff's action. Sufficient time had not elapsed since the defendant's removal to Missouri.

I find no error in the instruction complained of by the defendant below. (a)

(a) But see *Thomas v. Black*, 22 Mo. 330.

Ranney v. Bostic. 15 Mo.

The other Judges concurring, the judgment below will be affirmed.

RANNEY v. BOSTIC.

15 Mo. 215.

1. *Practice—Abatement.*—When no *scire facias* has been sued out for the purpose of substituting a person as plaintiff or defendant, in the place of the original plaintiff or defendant before the expiration of the third day of the second term after the death of the original party has been suggested, the necessary consequence is the abatement of the suit.

Appeal from Washington Circuit Court.

SCOTT & YOUNG, for appellant.

FRISSELL, *contra*.

[* 217] *RYLAND, J., delivered the opinion of the court.

Johnson Ranney commenced an action by attachment, against the defendant Bostic, returnable to the October term, 1848, in the circuit court of Washington county. The defendant was not served with the writ, he was not found, but certain lands were attached.

At the return term of the writ, the death of the plaintiff was suggested on the record, and the suit was afterwards revived in the name of his executor, William C. Ranney. After the suit was thus revived, the defendant entered his appearance by attorney and filed his plea (the statutory general issue), and the cause was continued.

At the October term, 1849, the death of the defendant, Bostic, was suggested on the record and the cause was continued, and was regularly continued from term to term, until October term, 1850. At this last term the following motion was made:

“Ranney’s administrator against Bostic’s administrator. The defendant moves the court to order said suit to abate for the reason, that the third day of the second term has elapsed since the

death of the defendant has been suggested, without a scire facias being issued to make a party, M. Frissell, attorney." This motion to abate, was continued until April term, 1851, when it was sustained and the suit ordered to abate. The plaintiff excepted to the action of the circuit court, and brings the case here by appeal.

From the bill of exceptions it appears, that there never was any administrator or executor of the defendant's estate. That in November, 1850, Israel McGready, as public administrator, by order of the county court, took charge of the estate of the defendant Bostic; but this was after the lapse of the third day of the second term of the court from the term in which the death of the defendant had been suggested on record. There never was any scire facias sued out to make a party defendant in this case. During the pending of the motion to have the suit abated, the plaintiff moved the court to allow and permit the public administrator to enter his appearance and defend the suit. It appearing that the public administrator was willing to do so without scire facias, if he was not entitled by law to have it abated. The court considering that it was the right of the public administrator to have the suit abated, overruled the plaintiff's motion, made pending the motion of Mr. Frissell, attorney, to abate the suit.

The only question for our consideration involves the correctness of the action of the court in sustaining the motion to abate the suit. There was an action pending from October term, 1849, at which the *defendant's death was suggested, [* 218] without any steps being taken to bring in his representative until October, 1850, that being the second term after the death of the defendant had been suggested on record. At this term after the lapse of the third day, a motion to abate was made, and at the next term was sustained.

The statute directs and controls the manner in which suits may be revived: Practice at Law, art. V, sec. 18, p. 824, Digest 1845. This section declares, that "no scire facias for the purpose of substituting a person as plaintiff or defendant in any suit in the place of the original plaintiff or defendant, shall be sued out after the expiration of the third day of the second term next after the

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term in which the death or disability of the original party shall be stated upon record.”(a)

It was by virtue of this provision, that the court sustained the motion to abate this suit. In this case there was no necessity for the motion to abate, for by the statute above quoted, the scire facias could not issue after the lapse of the time mentioned, and the necessary consequence was the abatement of this suit.(b)

There is nothing in the point, that the motion of Mr. Frissell, attorney, was an appearance of the defendant’s administrator. There was no administrator, no executor of the defendant at that time that could appear; nor was there anything in the form of that motion that could operate so as to make it act as an appearance by a representative of the deceased defendant, when, in reality, there was no such representative in being at the time. We do not look upon the scire facias in this case as a new suit; its object, if one had been issued in time, could only have been to carry on the original action, a mere continuation of the original suit.

The act of 1849, called “an act to reform the pleadings and practice in courts of justice in Missouri,” has nothing to do with this suit, as we conceive: it commenced before that act took effect, and it must proceed under the law as it existed prior to the above act of 1849.

I therefore think the court committed no error in ordering this suit to abate, and such being the opinion of the other Judges, the judgment below is affirmed.

THE STATE OF MISSOURI to the use of Zeigler, respondent in error, v. ST. GEMME & PRATTE, plaintiffs in error.

15 Mo. 219.

1. *Supreme Court—Printed Decisions.*—The printed decisions of the Supreme Court cannot be resorted to as guides in amending its records.

Error to St. Genevieve Circuit Court.

(a) Gen’l Stat. of 1865, chap. 170, § 6; Wagner’s Stat., p. 1050.

(b) Farrell v. Brennan, 25 Mo. 88.

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BOGŸ, for plaintiff in error.

HILL, *contra*.

SCOTT, J., delivered the opinion of the court.

This was an action, commenced in the name of the State of Missouri to the use of C. C. Zeigler, on an administration bond. The case was brought in the circuit court of Ste. Genevieve county, and a plea, that the cause of action did not accrue within ten years, was filed. A demurrer to this plea was overruled, and after judgment the cause was *taken to the [* 220] supreme court, at Jefferson, in the year 1843. In that court, it appears by its record, that a judgment of affirmance was entered. In the printed opinion of the case, it seems, that it was ordered to be remanded, and that the plaintiff have leave to withdraw his demurrer if he wished. We have no evidence that this permission was entered of record. Under this direction, the plaintiff took the cause back to the circuit court and proceeded in pursuance to it. In the meantime the defendants moved to dismiss the cause from the docket, for the reason, that there was a final judgment in the supreme court, and no leave had been given for further proceedings. This motion was overruled, and after judgment for the plaintiff the cause was brought here.

There being a final judgment of affirmance in the supreme court, and it not appearing from the record that the cause was remanded to the circuit court, with leave for further proceedings, it is not perceived on what principle it could be prosecuted in the court below. The pleadings having been made up, the suit could not be defeated by the defense of a former judgment, and the course pursued by the defendant was the only one open to him. If leave was really given, to withdraw the demurrer and take issue on the plea of the statute of limitations, the record should have been so amended as to show that fact, by an application to this court before any proceedings were had in the court below. While the written opinions of this court, or certified copies of them, might be resorted to, as guides in amending its records, it would

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be unsafe, as well as unwarranted by any principle, to give the printed decisions any such force.

The judgment will be reversed, and the cause remanded, to enable the party to amend his record, he paying the cost of this writ. The other Judges concurring.

SAUNDERS BURGESS, appellant, v. JOHN M. GRAY *et al.*,
respcndents.

15 Mo. 220.

1. *Titles to Land—Confirmation.*—The 2nd section of the act of Congress of the 3rd March, 1807 (2 U. S. Statutes at large, 440), only directs the board of commissioners to confirm such claims as may be brought within its provision, by evidence produced before them; and does not import a present confirmation, by the direct action of Congress upon the claims.
2. *Title—Inchoate Spanish.*—Until an inchoate title, originating under the Spanish government, has been confirmed, it has no standing in a court of law or equity.

Appeal from Jefferson Circuit Court.

GARLAND & KING, for appellant.

BEAL, *contra*.

GAMBLE, J., delivered the opinion of the court.

The petition alleges that John Jarnott, alias Gerard, in 1780, with the permission of the officers of the Spanish government, settled upon a tract of land now in Jefferson county, and continued to inhabit and cultivate it until 1796, when he was driven off by the Indians. His son Joseph succeeded him in possession of the land, and continued to reside upon and cultivate it until he sold it to one Kendall, in the year 1812. Kendall filed a notice of his claim with the recorder of land titles, who considered and rejected it. The right of Kendall, upon his death, descended upon his heirs, and that right is vested in the plaintiff by con-

veyances filed with the petition. The plaintiff, since [223] his purchase, has always been in possession. The claim was laid down upon the map of the public lands in the register's office, as reserved to satisfy John Jarnott's legal representatives.

In 1847 pre-emptions were allowed to different persons for different parts of the tract, and they made their separate entries, each person purchasing for himself. These purchasers are the defendants; and the plaintiff alleges that they all had notice of his claim, and of the reservation of the land from sale.

The prayer of the petition is, that the defendants be compelled to abandon their illegal claim to the land. The defendants demurred to the petition, and assigned as causes of the demurrer: 1st, That the petition showed no right in the plaintiff to maintain his action; 2d, That separate and distinct causes of action against different persons were joined in the petition.

The demurrers were sustained by the circuit court of Jefferson county, and the plaintiff has appealed to this court.

It is to be observed that the plaintiff shows no confirmation of his claim. The first and only assertion of it before any tribunal was its exhibition to the recorder of land titles by Kendall, after his purchase in 1812. The recorder refused to recommend it for confirmation, and since that time it has been utterly neglected. It is true, that the counsel now claim that it was confirmed by the second section of the act of the 3d of March, 1807, 2 U. S. Statutes at large, 440; but this is an entire misapprehension of the effect of that section. The words which declare that a certain class of claims "shall be confirmed," are only a direction to the board of commissioners to confirm the claims which may be brought within the class by evidence produced before them; and by no means import a present confirmation by the direct action of Congress upon the claims.(a)

The plaintiff, then, is to be regarded as the holder of an unconfirmed claim to land which the defendants have purchased from the United States, and the question is presented by the demurrer, whether such a title will authorize him to apply to a court for the relief he seeks.

(a) *Magwire v. Tyler*, 40 Mo. 440.

The supreme court of the United States, in *Le Bois v. Brammell*, 4 Howard, 462, and in *Mevard v. Massey*, 8 Howard, 307, distinctly declare, that until an inchoate title, originating under the Spanish government, has been confirmed, "it has no standing in a court of law or equity." This language was used in cases where the claimants had formal concessions from the lieutenant governor, and will certainly apply with as great force to a claim which rests upon a settlement made upon the domain by the permission of the Spanish officers. (a)

[* 224] *The plaintiff, then, has no title which authorizes him to ask the relief prayed for in his petition. But, he alleges that the land was, by different acts of Congress, reserved from sale in order to satisfy his claim, and therefore the purchases made by the defendants were void. Suppose it to be true, that the reservation did exist, and that its effect would be to render the purchases void, still his position in court is not changed thereby. The reservation confers no title on him, and the nullity of purchases made by the defendants does not enhance the merits of his title. He is still without any title that we can enforce.

In the argument, much reliance has been placed upon the case of *Perry v. O'Hanlon*, 11 Mo. R. 588, as supporting the right of the plaintiff to maintain this action.

Perry owned a Spanish claim, which, under the provisions of the laws of the United States, he relinquished, and obtained thereby the right to purchase the land claimed. He made the purchase, and afterwards the commissioner of the general land office directed the purchase to be vacated. The land was reserved from sale on account of Perry's claim, and that claim was, by his relinquishment under the act of Congress, changed into a right of pre-emption to the same land. O'Hanlon claimed by purchase while the reservation continued. This court decided, that, notwithstanding the action of the commissioner of the general land office, Perry's title, under his purchase, was a valid subsisting title, sufficient to maintain his action of ejectment, and that the purchase under which O'Hanlon claimed, being made while such purchase was forbidden by law,

(a) *Magwire v. Tyler*, 40 Mo. 435.

was void. The obvious distinction between that case and the present, is, that the plaintiff, Perry, was asserting a title which our laws recognize as a title under the United States, conferring a right to the immediate possession of the land, while the plaintiff in this case has no title that can be regarded in a court of justice.

If the plaintiff should obtain a confirmation of his claim, and should then find himself obstructed by void entries or void patents, he can come into court and dispute their validity; but in his present condition, coming as a plaintiff to complain that other persons hold certificates and patents for the land to which he has now no title, he can have no relief.

The demurrers were properly sustained, and, the other Judges concurring, the judgment of the circuit court is affirmed.

OLDHAM & BROADDUS, appellants, v. ELIZABETH TRIMBLE,
appellee.

15 Mo. 225.

1. *Administration—Bond, action on*—An action on an administrator's or curator's bond, may be instituted against a security before any indebtedness has been established, or any judgment obtained against the administrator or curator: *Devore v. Pitman*, 3 Mo. Rep. 130.
2. *Guardian—Final Settlement*.—After a final settlement by a curator, the ward may file a bill in equity, surcharging and falsifying his accounts; but such final settlement is a good defense to an action at law.
3. *Equity—Objection to Jurisdiction Waived by Answer*—If a defendant answer, instead of demurring to a bill, and the cause comes on to be heard upon the merits, it is too late to object to the jurisdiction of the court on the ground that the plaintiff has adequate remedy at law, which he might have pursued: 10 Mo. Rep. 652.

Appeal from Monroe Circuit Court, sitting in Chancery.

GLOVER & CAMPBELL, for appellants.

HOWELL, *contra*.

*SCOTT, J., delivered the opinion of the court.

[* 226]

This was a bill in chancery filed in February, 1848, by John A. Trimble and Elizabeth his wife, against the appellants. The bill substantially charges that the said Elizabeth, whose maiden name was Reid, in the year 1839 or 1840, was a minor, residing with her friends in Kentucky; that she possessed about \$200 which was in the hands of her guardian. Unwilling to diminish her small patrimony, her friends charged her little or nothing for board; that about this time A. P. Oldham, a relation of hers and a resident of Monroe county in this State, came to Kentucky and proposed to her to go home with him and live in his family, as he desired her company for his wife; that he would take her to Missouri and she should be treated as one of his own children, free of any expense, so long as she pleased to remain with him, and that he would gratuitously act as her curator; that she accepted this proposition and accompanied Oldham to Missouri, in whose family she lived until some time in September, 1844, performing such duties as were appropriate for one in her situation; that in June, 1845, the said John A. Trimble and the said Elizabeth were married; that in September, 1840, by appointment of the county court of Monroe county, the said Oldham became curator and guardian of the said Elizabeth, and pursuant to law executed a bond with Jesse Oldham and Hudson Broaddus as his securities; that in the year 1840 and '41, the said Oldham received as curator, from her former guardian in Kentucky, about the sum of \$201.64; that in 1842 he made a settlement of his accounts as curator and charged himself with the sum of \$185, which was alleged to have been received from her guardian in Kentucky; that in February, 1844, another settlement was made, in which he, against all his promises and assurances, fraudulently and without any vouchers charged the said Elizabeth with the sum of \$185 for "*board and clothing for four years, and bringing her from Kentucky, and for horse, saddle and bridle,*" [* 227] "*and for money paid for tuition, board, &c.,*" that a part of this charge is false and the rest unsupported in right or justice; that Jesse Oldham, one of the securities in the bond of the said Wm. P. Oldham, as curator, has departed this life and his estate upon an administration has proved insol-

ent. It is further charged that the said settlements were not made at the times required by law, and that they are fraudulent.

The answer of Oldham admits that he brought the complainant Elizabeth from Kentucky, in the early part of the year 1839, and by her election became her guardian and curator and executed the bond as stated in the bill; that he was induced to become her curator, because it was represented here, that her guardian in Kentucky was in failing circumstances; that to obtain the money to which the said Elizabeth was entitled in Kentucky, he went thither at a time little suited to his convenience and found her guardian charged with about \$200, subject to some claims amounting to about \$15, which being deducted left the sum of \$185, with which he charged himself as stated in the bill; that said Elizabeth lived in his family four years and was provided with board, lodging, clothing, medical attendance, &c., and was sent to the singing school at his expense; but he is not aware of her rendering any service to his family, as an equivalent therefor; that said Elizabeth's friends in Kentucky were his mother, who was a widow, and encumbered with a large family, and the complainant's step-mother, who having taken a younger sister of the complainant, to live with her, was unwilling to support said complainant; that for these reasons he brought her from Kentucky. He admits the last settlement as charged in the bill, but although it was out of time, he denies that it was fraudulent. He alleges that he has no recollection of having made any promise to the said Elizabeth, that she should live in his family free of all charge; that he may have said that he was as able to support her as any other connection, and if she never got any thing, he should never charge her. That said complainant has received a negro girl from her father's estate. He admits the marriage of the complainant.

Broaddus, in his answer, admits that he was security in the bond of Oldham as curator.

No notice is taken of the cross-bill and answer, because the matter they contain is all involved in the original bill and answer.

John A. Trimble, one of the complainants having died, the cause stood in the name of Elizabeth, his wife.

Several witnesses were examined, whose depositions sustained the averments in the complainant's bill. Elizabeth [* 228] Reid was about fourteen *years of age when she left Kentucky, and lived with Oldham between four and five years. Oldham induced her to believe, that she would live with him free of expense. The complainant was residing in Kentucky with her aunt, when she left for Missouri, and was not charged with board, and Oldham said to her that he was as able to support her as any of her connections. Oldham had several small children and his wife was in delicate health. There were a negro man and woman and a girl nearly grown, in the possession of Oldham. The complainant performed in the family all the services usual for a young lady in her condition of life; she was well treated and decently clothed. One witness testified that Oldham told complainant she never should be charged unless she received something. After paying a sum of money she did receive a small negro girl. Oldham gave complainant a horse, which not suiting her, was exchanged for another of Oldham's horses worth forty dollars. The horse received in exchange was by him sent to the lower country and sold, but his value never accounted for. The complainant's board and clothing were worth from \$65 to \$70 per annum, had she rendered no services in the family. In 1844 or 1845, Oldham became embarrassed and was finally sold out.

The court rendered a verdict for the complainant for the sum of \$85, from which the defendants appealed to this court. It has been long settled in this State, that an action on an administration bond may be instituted against a security before any indebtedness has been previously established or any judgment obtained against the administrator: *Devore v. Pitman*, 3 Mo. Rep. 130. This rule, although contrary to that which prevails in some other States, has been too long established now to be overturned. No distinction can be maintained between an administrator and a curator. In the case before us a settlement of the curator's accounts had been made and it appears that he had disposed of and accounted for all of his ward's estate. This settlement had the sanction of the county court, and was *prima facie* correct. But although a final settlement of the accounts of a curator may

be made in the county court, yet that settlement will not prevent the ward from filing a bill in equity, surcharging and falsifying his accounts. In the case of *Clark and wife v. Henry's administrator*, 9 Mo. Rep. 339, it was held, that after the final settlement of an administration account, a bill in equity might be filed for the purpose of overhauling the settlement and showing that the administrator had committed a devastavit or fraud in the management of the estate entrusted to his care. If the settlement of the accounts of administrators are subject to the revision of courts of equity, when appeals from those settlements are allowed by law, it would seem that such revision is much more required in the case of curators from whose settlements the law appears to have provided no appeal. [* 229]

If an action of law had been instituted on the bond the settlement in the county court might have been interposed as a defense, it being equivalent to a judgment of a court of competent jurisdiction. The complainant was then driven to his bill in equity. (a) There is no obstacle in enforcing the liability of the curator in this form of procedure. The only difficulty is as to the security. The penalty of the bond prescribed a limit to his responsibility. Whatever form of remedy may be adopted, it is clear that he cannot be subjected to the payment of a sum exceeding the penalty of the bond. But even if the surety was not subject to the mode of proceeding which has been employed in this cause, yet, as the parties had answered, and the cause had been tried on its merits, and all the evidence had been heard, it was too late for the first time to raise the question of jurisdiction as to the parties. This court has repeatedly held, that if a defendant answer instead of demurring to the bill, and the cause comes on to be heard upon the merits, it is too late to object to the jurisdiction of the court, on the ground that the plaintiff has adequate remedy at law which he might have pursued: *Martin v. Greene*, 10 Mo. Rep. 652. (b)

(a) *Jones v. Brinker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *Sullivan Co. v. Burgess*, 37 Mo. 300.

The rule applies only to final settlements; *Picot v. Biddle*, 35 Mo. 22; *Baker v. Runkle*, 41 Mo. 391.

(b) *Block v. Chase*, *post.* p. 344.

On the merits, the case is clearly with the complainant. From the evidence, there can be no doubt, but that the defendant Oldham induced the complainant to believe that she should live with him free of expense. She was living in a family where she was not charged with board. He induced her to leave that family and reside with him, saying, that he was as able to support her as any of the connections. If she was not to have been supported gratuitously, it does not appear, but that the services rendered by her were an equivalent for her maintenance. If Oldham had intended from the first to charge the complainant with the expenses incurred in bringing her to Missouri, why did he not have them allowed at his first settlement, as they were then due? The charge for the horse is manifestly so unjust, that it is of itself sufficient to stamp the whole account with suspicion. The defendant Oldham gave complainant a horse, which she afterwards exchanged with him for another. The horse given in exchange was sold by the defendant and its value never accounted for. Because he, without the consent of the complainant sent her horse to the south and sacrificed him, he cannot deprive her of his worth in Missouri. It may well be supposed that [* 230] she was charged with the value of the horse, as *estimated here at the time of the sale. Is is very strange, that a court, intrusted with superintending control over the care and management of the estate of minors, should allow a charge in the form of that which is made against the complainant in this case. Here is a lumping charge for *board and clothing five years and bringing her from Kentucky, and for horse, saddle and bridle and for money paid in Kentucky for tuition, &c.*, amounting to \$185. There is no other specification of the items; no statement of the sum charged for each item nor any reference to anything which throws any light on the subject. There is even an &c., and what is included in that we are left to conjecture. No person in his individual capacity would pay such an account. It is a little remarkable, that the charge against the complainant should precisely correspond, in amount, with the sum with which he was charged. It is plain, from all the circumstances, that the making of an account against the complain-

ant was an after-thought, else it would never have been put in the form in which it was presented to the court.

Judge Gamble concurring, the decree will be affirmed.

Judge Ryland, absent.

DUGANS, respondents, v. LIVINGSTON, appellant.

15 Mo. 230.

1. *Wills—Construction.*—The testator's understanding of the words used in his will, ascertained from the will itself, must be adopted in construing the will.

Appeal to Washington Circuit Court.

JOHNSON, for appellant.

FRISSELL, *contra*.

RYLAND, J., delivered the opinion of the court.

Jerry, John, Thomas Cox and Noah George Dugan brought their suit, in the circuit court of Washington county, against Thomas R. Livingston. The plaintiffs were children of Stephen Dugan, deceased; and the suit was for a negro boy named Toney. The defendant claimed under Catherine Dugan (the widow of said Stephen Dugan, deceased), one-sixth part of said negro. Matilda Maness, and her husband Pleasant Maness, on their application, were made parties to the suit, and filed their answer, claiming one-sixth or a child's part of said slave.

The following facts appear by the record: Stephen Dugan made his will on the 17th of September, 1839, and died in January, 1843. At the date of his will he owned but one slave, and that was the boy Jack, mentioned in the will; he also owned cattle, horses, hogs, sheep, oxen, &c. That [* 233] after the date of the will, he acquired a negro woman and child, which, with the boy Jack, he sold. He then purchased another woman and child; that he sold the woman and kept the

child, and this child is the boy Tony, sued for. That Stephen Dugan left five children—the four sons the plaintiffs, and Matilda Maness, and that Catherine Dugan is his widow. The will of Stephen Dugan is as follows, leaving out the formal commencement: 1st, My wife Catherine will enjoy the use of my place, where I now live in Richmond township, county and State aforesaid, containing about four hundred and forty acres more or less, for as long as she remains a widow.

“2d. My wife Catharine will be also entitled to as much of the stock as will do for the support of my four children and herself, that is to say, Jerry, John, Thomas Cox and Noah George; the said stock will go to my four children, with their increase, after the death or marriage of my said wife.

“3d. All the balance of my perishable property, excepting my negro boy Jack, will have to be sold according to law, and the proceeds from it equally divided amongst my four first-mentioned children, that is for their own use, to school them, and then after they are of age divided equally.

“4th. My negro boy Jack is to be hired out, until my youngest boy, N. George, becomes of age, and then he will be sold, and the money divided equally between my four children; the wages of the boy will also be for their use.

“5th. That I give to my daughter Matilda five dollars cash out of my estate.

“6th. After my wife Catharine's death or marriage, all my land and farm first mentioned is to be divided equally amongst my four children, Jerry, John, Thomas Cox and Noah George.

“7th. Appoints executors. Signed and sealed 17th September, 1839.”

The question in this case is, did Stephen Dugan die intestate, as to the boy Toney, and if so, will Toney belong equally to all the children and the widow, or whether he passed to the plaintiffs in the third clause of the will under the terms “perishable property,” and so would belong to the four boys, in the exclusion of the widow and the daughter? The plaintiffs maintain the latter proposition, and the defendant the former. Several instructions concerning the construction and rules for interpreting wills were

asked by the defendants, some of which were given and others refused ; but as the will must be construed by this court, it is not necessary to insert here the instructions.

The case was tried by the court, and verdict and judgment given *for the plaintiffs. The defendants moved [* 234] for a review and new trial, which was overruled, and the case comes now before us by appeal.

Nothing is said about the right or ability of the plaintiffs to maintain this action, or about the settlement of Dugan's estate finally, or the payment of his debts. These matters were not brought before the consideration of the court below, nor will this court notice them further.

The words "perishable property" are not generally used in our legislation as including slaves ; "personal property" is the phrase generally intended to embrace them, when they are not otherwise mentioned expressly as "slaves" or "negroes." See the act concerning administrators and executors in 1835 and 1845, *passim*. But in the will before us, it is plain that the testator supposed these words "perishable property" did include and embrace his negroes, for he expressly excepts Jack, the only slave he then owned, from the operation of the third clause of his will, by which he directs that "all the balance of my perishable property excepting my negro boy Jack, will have to be sold according to law," &c. Now the exception of the negro boy Jack, in this clause, forces on my mind irresistibly the meaning that the testator gave to the words perishable property : He believed that the negro Jack would be included under these words, and therefore he excepts him from their operation. Nor is there any positive legal violation in giving this meaning to these words. This, then, being the testator's understanding of the words "perishable property," it will be adopted by this court in construing the will, "without resorting to lexicographers to determine what the same words may mean in the abstract ; or to adjudicated cases to discover what they have been decided to mean under different circumstances." See *Carnagy & Wife v. Woodstock and Mackey*, 2 Munford, 239.(a)

(a) *Peters v. Carr*, 16 Mo. 54.

Knox v. Sikes, Adm'r of Wright. 15 Mo.

It is not the opinion of this court, that the boy Toney can be made to take the place of Jack and be disposed of under the will as Jack would have been, had he remained the testator's at his death instead of Toney; nor do we consider that the testator died intestate as to the boy Toney. Having made his will, it would be with great reluctance that the courts would declare he died intestate as to any property that can be reasonably included under the provisions and by the terms of the will. According to our understanding of the use of the words "perishable property," made by the testator in this will, the negro boy Toney passed with the perishable property to his four sons, the plaintiffs.

This being the construction placed upon the will by [* 235] the court below, *we see no cause to reverse the judgment. The other Judges of the court concurring, the judgment below is affirmed.

KNOX, defendant in error, v. SIKES, Adm'r of J. H. WRIGHT,
plaintiff in error.

15 Mo. 235.

1. *Practice—Bill of Exceptions.*—It is the duty of the party complaining of the finding of the court below, to preserve the evidence, upon which the decree of the court was based, so as to show the matters of law or fact of which he complains.

Error to New Madrid Circuit Court.

[*237] *BUCKNER, for plaintiff in error.

COOK, *contra*.

RYLAND, J., delivered the opinion of the court.

From looking over the records in this cause, I find [* 238] no bill of exceptions, *saving anything for our revision.

We will not interfere in a case of this kind. It is the duty of the party making complaint of the improper finding of the court below, to preserve the evidence; to be able to show to this

court the matters of which he complains, either of law or fact, in cases of this nature.

In this case, upon the final hearing, a decree is made without objecting to any evidence, or without saving the evidence on which the decree was based, and without a motion for a rehearing or new trial.

The case, indeed, presents nothing on the record, entitling the party to any consideration of this court.

With the concurrence, therefore, of the other Judges, the decree of the court below is affirmed.

MOORE and WIFE, plaintiffs in error, v. CHAMBERLIN, defendant
in error.

15 Mo. 233.

1. *Practice Act of 1849—Detinue.*—Under the new practice, there is no longer any action of detinue, nor any power to issue a *capias* in such action.

Error to St. Louis Circuit Court.

A. P. & P. B. GARESCHE, for plaintiffs in error.

HART, *contra*.

RYLAND, J., delivered the opinion of the court. [239]

The question in this case, is one respecting the jurisdiction of the Law Commissioner in St. Louis, in regard to the action of detinue, and his authority to issue a *capias*, after the 4th day of July, 1849, the day that the new code of practice went into effect.

The "Act to reform the pleadings and practice in courts of justice in Missouri," borrowed or copied, in a great measure, from the New York code, and which took effect, July 4th, 1849, abolished all distinction *between different [* 240] actions at law, and all the forms of such actions and suits heretofore existing.

Under this act it is manifest, that there is no longer any action of detinue, nor any power to issue a *capias* in such action in our circuit courts. The jurisdiction of the action detinue was given to the Law Commissioner's court of St. Louis concurrently with the circuit court: See statute 1847. Though the practice act, prohibiting its provisions from operating on justices' courts (except the XXV article), fails to exempt the proceedings of the Law Commissioner's court from its operation, yet, we are of the opinion that that act also controls, whenever applicable, the proceedings of the Law Commissioner, and has, accordingly, abolished the action of detinue before such Law Commissioner, and consequently, that the Law Commissioner had no authority to issue the *capias* in this action.

We think it was the object of the legislature to extend the provisions of the new code of practice to the Law Commissioner's court, as far as they were applicable to the proceedings of said court.

Under this view of the subject, the circuit court committed no error in dismissing the plaintiff's action. The other Judges concurring, its judgment is affirmed.

AMANDA ABINGTON, plaintiff in error, v. THOS. L. TRAVIS
defendant in error.

15 Mo. 240.

1. *Husband and Wife—Choses in Action.*—Where a chattel is bequeathed to the wife for life, and the husband, before he receives it from the executor, sells it, and the purchaser takes and retains the possession, it is such a reduction of property in possession, by the husband, as bars the wife's right of survivorship.

Error to St. Charles Circuit Court.

BUCKNER, for plaintiff in error.

COALTER, *contra*.

GAMBLE, J., delivered the opinion of the court.

The only question in this case requiring examination, is, whether the purchase of the slaves by the defendant, Travis, and his subsequent possession of them in the life time of John B. Abington, the husband of the plaintiff, terminated her right of survivorship.

Travis, it appears, was the owner of the reversionary interest in the slaves, after the termination of Mrs. Abington's life estate; and the bond required to be given by the order of the county court, was for the protection of his rights.

When John B. Abington, the husband of the plaintiff, agreed with the defendant, Travis, that Travis should purchase the slaves for a specific price, at the sale to be made by the constable, and when that purchase was accordingly made, and part of the agreed price was paid to the constable and the balance to Abington, the transaction was a direct sale by Abington himself. As the possession has, ever since the purchase, remained in Travis, we have the case of a bequest of a chattel to a woman, and the sale of the chattel by her husband before he had actually received it from the executor, but always, after the sale, continuing in the possession of the purchaser. There can be no doubt that this is such a reduction of the property into possession as bars the wife's right of survivorship.

Chancellor Kent, in his elementary treatise, 2 Comm. 137, 2d edition, states the law in relation to a wife's choses in action thus: "The rule is, that if the husband appoints an attorney to receive the money and he receives it, or if he mortgages the
[* 214] *wife's choses in action, or assigns them without reservation for a valuable consideration, or if he recovers the debt by a suit in his own name, or if he releases the debt, in all these cases upon his death, the right of survivorship in his wife, to the property, ceases." This language is transcribed from the opinion delivered by the learned author in the case of *Schuyler v. Hoyle*, 5 Johns, Ch. R. 196.

The sale by Abington, in its most limited operation, was a transfer of all the right which he as husband had, to reduce the slaves to possession and hold them as his own property. This power has been exercised by the defendant, his vendee, while the coverture continued, and his possession has never been disturbed

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nor his right to the possession disputed by the executor. The executor might well waive the bond required in the order of the county court, when the entire estate in the slaves was vested in the defendant and there was no person who could be benefitted by the bond.

The judgment of the circuit court was rightly given for the defendant, and is, with the concurrence of Judge Scott, affirmed.

ETIENNE ROUSSIN, plaintiff in error, v. THE ST. LOUIS PERPETUAL INSURANCE COMPANY, defendant in error.

15 Mo. 244.

1. *Practice—Exceptions.*—When objection is made to the admission of evidence, the bill of exceptions must show the grounds of such objection.
2. *Practice—Evidence.*—When the supreme court is asked to reverse a judgment of the circuit court, because competent evidence was rejected, it must appear on the record that the evidence rejected, might and ought to have had some influence, in finding a verdict on the questions of fact.
3. *Practice in Equity.*—Such parts of a bill of discovery as are not answered, or not sufficiently answered, cannot be taken as confessed. The party seeking the discovery, if he considers the answer insufficient, must except to it, and have the decision of the court upon his exception.
4. *Evidence—Presumptions.*—It will be presumed that a note held by a corporation, was acquired in a manner allowed by its charter, when the record does not show the nature of the transaction.

Error to Washington Circuit Court.

SCOTT & YOUNG, for plaintiff in error.

LORD, *contra*.

[* 246] GAMBLE, J., delivered the opinion of the court.

The Perpetual Insurance company commenced an action of assumpsit against Roussin in the circuit court of Washington county, charging him as maker of a promissory note, pay-

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able to one Isaac Burnett and endorsed to the plaintiff. Roussin, after pleading the general issue, filed a petition for discovery, and the court ordered certain officers of the company to answer the petition. Answers were filed and the parties proceeded to trial.

The plaintiff read in evidence a deposition of Seth A. Ranlett. It is stated in the bill of exceptions, that Roussin objected to the deposition and that the objection was overruled, but the grounds of the objection are not stated. The plaintiff read in evidence two acts of the general assembly, the first, incorporating the Insurance Company, and the second, changing its original corporate name. To these acts the defendant *objected, '[* 247] but the ground of the objection does not appear. The defendant then read in evidence his petition for discovery and the answers made to the interrogatories. After proving that George Burnett, Jr., was in the employment of Isaac Burnett, as clerk, on the 8th day of April, 1842, he offered to read in evidence a receipt, signed by said George Burnett, in these words:

"Rec'd, Saint Louis, April 8th, 1842, of Messrs. E. Roussin & Co. per Messrs. Chouteau & Valle four hundred dollars on apt. of note.

ISAAC BURNETT,
per GEORGE BURNETT, Jr."

This receipt was objected to by the plaintiff and was excluded by the court.

The only instruction asked by either party was asked by the defendant in these words: "That all such parts of the defendant's bill of discovery as were not answered or not sufficiently answered by the respondents, should be taken as confessed and considered as evidence for the defendant." This instruction was refused. A verdict having been found for the plaintiff, the defendant moved for a new trial. A motion in arrest of judgment was also made on the ground that the Insurance Company could not legally take a promissory note, by indorsement, as the charter conferred no banking powers. The motions were both overruled. The defendant excepted to all the decisions of the court, made against him, and presents the same points here for consideration.

It may be considered the settled rule of this court, to disre-

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gard all objections to the reading of depositions, unless the bill of exceptions shows the specific objection made and decided upon in the circuit court: *Dickey and others v. Malechi*, 6 Mo. R. 186; *Frost v. Pryor*, 7 Mo. R. 316; *Field v. Hunter*, 8 Mo. R. p. 131; *Bank of Missouri v. Merchants Bank of Baltimore*, 10 Mo. R. 128. The objection now made to portions of Ranlett's deposition cannot therefore be considered. It cannot be known that the question now presented is that upon which the circuit court decided. (a)

It is not perceived upon what ground the defendant objected to the two acts of the general assembly. The counsel suggest in argument that these two acts should not have been admitted without requiring the plaintiff also to read in evidence the act incorporating the Farmer's and Mechanic's Insurance Company; but on examining the charter of the Farmer's and Mechanic's Insurance Company, it will be seen that the 13th section declares it to be a public law which is not required to be given in evidence.

The objection to these acts is as general as that made [*248] to the *deposition of Ranlett and it is proper to state here, that the same rule which requires the specific objections made to depositions to appear upon the bill of exceptions, applies to other evidence and testimony given in a cause.

The receipt offered in evidence, did not appear to have any connection with the note sued upon. By its own terms, it imported that a payment had been made by Roussin & Co. upon their own note. There is nothing in the case tending to show that the note declared on, was the note of Roussin & Co. or that the payment by Roussin & Co., as shown by the receipt, was applicable to this note. When this court is asked to reverse a judgment of the circuit court, because competent and relevant evidence was rejected, it must appear on the record that the evidence rejected might and ought to have had some influence in finding a verdict in the questions of fact. (b) The receipt was properly rejected.

(a) *H. & St. J. R. R. v. Moore*, 37 Mo. 341; *Woodburn v. Cogdal*, 39 Mo. 222; *Public Schools v. Risley*, 40 Mo. 369.

(b) Nor will the court reverse on account of the admission of irrelevant evidence, unless it was calculated to prejudice or mislead the jury; *State v. Jennings*, 18 Mo. 435; *Craighead v. Wells*, 21 Mo. 404; *Hahn v. Sweazea*, 29 Mo. 199; *Picker v. Haidorn*, 30 Mo. 93.

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The instruction asked by the defendant was properly refused. Our statutory proceeding, to obtain a discovery, is a substitute for the bill in chancery for the same purpose. The party who is *required to answer*, answers the interrogatories and the court will compel full and sufficient answers before the trial of the cause will be permitted to proceed. The party seeking the discovery, if he considers the answer insufficient, must except to it and have the decision of the court upon his exception. After he has proceeded with the trial and read the answer in evidence he cannot object to the sufficiency of the answer or ask for any farther action of the court upon his petition.

The motion in arrest of judgment was properly overruled. The record did not show the nature of the transaction in which the plaintiff obtained his promissory note from Burnett the endorser, or what was the consideration for the endorsement. The plaintiff possessed all the powers conferred upon the Farmers' and Mechanics' Insurance Company. That company, by the 5th section of its charter, had power "to lend its surplus or unemployed money or capital on interest not exceeding ten per cent. to companies, corporations or individuals upon personal or real security." In the ordinary business of insurance, such corporations have debts owing to them for premiums and for other considerations. There is nothing then on the record to show that this note was not secured by the company from Burnett for a debt due for premiums or for part of its unemployed capital loaned to him—nothing to show that it was received in any illegal business in which the company was engaged.

As the points made by Roussin, for the purpose of reversing the judgment, are all ruled against him, the judgment of the circuit court is, with the concurrence of the other Judges, affirmed.

Gordon v. Scott & Mudge. 15 Mo.

GORDON, respondent, v. SCOTT & MUDGE, appellants.

15 Mo. 249.

1. *Appeal—Transcript.*—If on an appeal from a justice of the peace, the appellant fails to have the transcript of the justice filed, the circuit court may, upon the appellee's filing a transcript of the record and proceedings, and paying the fee, affirm the judgment of the justice.

Appeal from St. Louis Circuit Court.

HILL, for appellants.

DAYTON, *contra*.

[*253] *RYLAND, J., delivered the opinion of the court.

This case comes fully within the principles decided by this court in the case of *Hardison v. Steamboat Cumberland Valley*. It involves the authority of the circuit court to affirm a judgment of a justice of the peace, on which an appeal has been taken, but in which the appellant had omitted to have the transcript of the justice filed, either by attending to it himself or by causing the justice of the peace to file it.

It appears in this case, that the appellants' counsel had paid to the clerk of the court, at the beginning of the term to which the appeal was taken, the jury fee, but had received it back again at the end of the term.

[*254] *About a year after the appeal was taken, the appellee, below, filed in the circuit court, a transcript of the records and proceedings had before the justice of the peace, paid the jury fee and moved the court to affirm the judgment, and the court sustained said motion.

This act of the court is the cause of complaint before us. We shall not disturb the judgment below. This case falls fully within the decision made by this court in the above case of *Hardison v. Steamboat Cumberland Valley*, 13 Mo. R. 226, to which we refer for the settlement of the case.

It will not answer, for the appellants to content themselves by looking, at each term, at the calendar of the cases set for trial, and finding no trace of their appeal, to do nothing further.

They knew when they made the application for the appeal, whether it was granted them or not; and not finding any notice of it on the docket, their remedy was to apply for a rule on the justice: See § 15 art. VIII, Justices' Courts, Digest 1845, page 670.

"Upon an appeal being made and allowed, the circuit court may, by rule and attachment, compel a return, by the justice, of his proceedings in the suit, and of the papers required to be by him returned." (a)

The appellants had but to make their motion to the court, had they been anxious to have a trial anew, and they could have compelled the justice to file the appeal: but, to wait for a year, without doing anything more than to pay the jury fee at first, and then take it back, and to watch the docket, and see if the appeal had been filed, is not that kind of diligence favored by the law. The other Judges concurring, the judgment below is affirmed. (b)

BURD *et al.*, appellants, v. Ross, respondent.

15 Mo. 254.

1. *Witness—Competency*—A clerk who pays out the money of his employer by mistake, is a competent witness for his employer in an action to recover it back.

Appeal from St. Louis Court of Common Pleas.

POLK, for appellants.

FREEMAN & REBER, *contra*.

RYLAND, J., delivered the opinion of the court. [257]

The competency of the witness, Joseph R. Ross, and the refusal of the court below to give the third instruction, as set forth in the above statement for the defendants, are the main

(a) Gen'l Stat. of 1865, chap. 185 § 15. Wagner's Stat, p. 849.

(b) Harley v. McAuliffe, 24 Mo. 85.

questions for our adjudication in this case. The errors assigned by the appellants, have reference principally to these questions.

Let us consider them : First, as to the competency of the clerk, Jos. R. Ross. We entertain no doubt of his competency. He, as clerk of the plaintiff, was induced, obviously, by the statements of the defendant, Rucker, to pay the money, under a misapprehension. From necessity, the clerk in this case was the proper person to prove the payment for his principal, when suing to recover the money back. He, in all probability, must have been the only person who knew or could prove the fact.

It is well settled, that a cashier and teller of a bank, though they may have given bonds to the bank for the faithful performance and discharge of their duties, may yet be witnesses for the bank, to charge a defendant on a promissory note, or for money lent, or overpaid, or obtained from the office without security, which he should have received. So is a carrier admissible for the plaintiff, to prove that he paid money to the defendant by mistake, in an action to recover it back. Persons thus situated in regard to interest, are admitted as witnesses, on the grounds of public necessity, and convenience, and to prevent a failure of justice. See 1 Greenleaf's Evi. sections 411, 416; 15 Wend. 316.

In this case from Wendell, a teller was offered as a witness for the plaintiff, (*U. S. Bank v. Stearns.*) The teller had given bond to the bank as its officer, yet the supreme court of New York admitted him as a witness. Ch. Just. Savage uses this language, "if, however, he was interested, I am inclined to think him admissible, upon the same principle of necessity, which admits an agent or servant, in the common course of his business; a porter who has delivered goods for his employer; a cartman, who [* 258] has delivered goods; a common carrier, a factor *or broker, even where he is to receive a per centage for his commission."

Such witnesses are admitted from necessity, because, from the nature of the case, it is exceedingly improbable that any person, not interested, should possess any knowledge of the facts. Such necessity must be general in its nature, embracing a large and definite

Parkinson v. S. B. Robt. Fulton. Lackland v. Dougherty. 15 Mo.

class of cases, and such as arise in the natural and usual course of human affairs: 2 Stark. Ev. 753, 767-8, note 2.

As to the second point in this case, the refusal to give the instruction numbered (3) in the above statement, we think was very correctly passed upon by the court. That instruction was not calculated to assist the jury in forming a correct understanding of the case.

An imposition upon the credulity of the clerk, thereby inducing him to pay money which in justice to his employer, he should not have paid, however artfully or openly practiced, surely can afford no sufficient bar to the plaintiff's right of recovery in this action.

The other Judges concurring, the judgment below is affirmed.

PARKINSON, respondent v. STEAMBOAT ROBERT FULTON, appellant.

15 Mo. 258.

1. The return of a constable on a warrant against a steamboat, showing that he executed it, by going on board the boat, and by reading the same to the clerk, and by finding the sheriff in charge of her, is sufficient to give the justice issuing the warrant, jurisdiction to hear and determine the case against the boat.

This case simply affirms Noel v. St. Bt. Eureka, 14 Mo. 513.

LACKLAND, circuit attorney, v. DOUGHERTY, city recorder.

15 Mo. 260.

1. *Circuit Attorney—Fees.*—The circuit attorney is not entitled to a fee for an appearance in cases arising under the statute forbidding free negroes to reside in the State without license.

Appeal from St. Louis Circuit Court.

LACKLAND & JAMISON, for appellant.

*RYLAND, J., delivered the opinion of the court.

[* 262]

The point before us questions the duty of the circuit attorney, to prosecute in the cases arising under the statute forbidding free negroes to remain in this State without license. If it be his duty to prosecute in these cases, then he is entitled to his fees, otherwise not.

We consider that the act requiring circuit attorneys to prosecute all civil and criminal actions, in which the State or county may be concerned, and also to prosecute on forfeited recognizances and other actions for the recovery of debts, fines, penalties and forfeitures, does not apply to the special proceeding under the statute about free negroes remaining here without license. If this were the case, then it would be the duty of every circuit attorney in the State, however large the circuit in which he acts, to attend to such proceedings before any justice of the peace within his circuit, which would be absurd. The legislature never designed nor contemplated such a thing.

[* 263] *It not being his duty, as we conceive, he has no right to charge a fee for his voluntary appearance on the part of the State. The circuit court, therefore, decided correctly in refusing to make the mandamus peremptory. The other Judges concurring, its judgment is affirmed.

STATE, respondent, v. DAME, appellant.

15 Mo. 263.

1. *Practice in Criminal Cases—Assignment of errors.*—No assignment of errors is required by law to be made in criminal cases.(a)

Appeal from St. Louis Criminal Court.

LACKLAND, for the State.

[* 265] *RYLAND, J., delivered the opinion of the court.

Adam Dame and Matthias Mosbacher were indicted in the criminal court for the murder of Charles Schaffer. The trial of Dame was a separate one: The jury convicted him of murder in

(a) Gen'l Stat. of 1865, chap. 215, § 20; Wagner's Stat., p. 1115.

the second degree, and assessed his punishment to confinement in the penitentiary for seventy years. The judge of the criminal court commuted this punishment to the term of twenty-five years. A motion was made for a new trial, which was overruled by the court; to which the defendant excepted, and brought the case to this court by appeal.

No grounds of error have been pointed out, and no errors have been assigned, none being required by law in criminal cases. (a)

We have therefore looked into the record and proceedings, and find that there was much testimony tending to prove the defendant's guilt.

We have examined the instructions, and the objections made to them, and the objections, also, to the evidence. We find the instructions sufficiently correct. We think the court fairly left the case with the jury, upon the law. Also, we find no error in regard to the admission of any testimony in the case.

With the concurrence of the other Judges, the judgment of the criminal court is affirmed.

MILLER, appellant, v. JANNEY'S Executor, respondent.

15 Mo. 265.

Appeal from St. Louis Circuit Court.

1. *Administration—Classification of Demand.*—A demand allowed and classed by the probate court cannot afterward be placed in a different class, except for such causes as would authorize the setting aside or modifying the judgment in other particulars.

KASSON, for appellant.

SPALDING & SHEPLEY, *contra*.

RYLAND, J., delivered the opinion of the court.

The question for us to decide in this case, relates to the action

(a) State v. Marshall, 36 Mo. 400.

of the probate court, in refusing to alter its judgment, and re-class the plaintiff's demand, so as to place it in the fifth instead of the sixth class of claims.

[* 268] *The probate court refused the motion of the plaintiff, for this purpose: he applied to the circuit court, which reversed the judgment of the probate court, and ordered the claim to be classed in the fifth class, by the probate court.

The executor brings the case before us, from this judgment of the circuit court.

From the facts contained in the record, we have no hesitation in saying, that the probate court could not have legally classed the demand, from the state of the facts before that court, in any other than the sixth class of claims. The probate court, having classed the demand in the sixth class, as the case stood at the time of the judgment and classification, it was the duty of the claimant, if he had any evidence upon which the court could have placed the claim in a different class, to have produced it when the demand was allowed; so that the probate court might have examined such evidence and declared its effect.

To change the class, is to change the force of the judgment, as to all creditors in the prior class, which should not be done, but upon such facts, only, as would authorize the court to set aside or modify its judgment in other particulars.

The fact, that the claimant had evidence of the prior presentation of the demand to the executor, which he neglected to offer the probate court, at the time the demand was allowed and classed, does not authorize the court to change the class afterwards.

The report of claims, by the executor, is not the evidence upon which the claimant is to rely, as it is not made for the purpose of classifying demands.

The circuit court, therefore, erred in its judgment, directing the probate court to class this demand in the fifth class. Its judgment is therefore, with the concurrence of the other Judges, reversed.

BUTCHER, respondent, v. DEATH & TEASDALE, appellants.

15 Mo. 271.

1. *Practice—Instructions—Facts admitted by the Pleadings.*—The duty of the court to tell the jury what questions of fact are to be tried, and what facts stand admitted by the pleadings, is not changed by the Act of 1849, regulating practice in courts of justice.(a)
2. *Pleadings—Amendments.*—That Act allows amendments even at the trial to avoid a non-suit on account of a variance. Still, the cause of action for which the plaintiff recovers, must be the same which he charges against the defendant.(b)

Appeal from St. Louis Court of Common Pleas.

HART, for appellants.

HUDSON, *contra*.

GAMBLE, J., delivered the opinion of the court.* [* 272]

The plaintiff, Butcher, sued Death & Teasdale, alleging in his petition, that they had sold him a quantity of hams, representing them to be sound, and of the best quality, and that he paid the bill for the hams, at the stipulated price; that the hams were shipped to Cincinnati, and upon being opened and examined, were found deficient in quantity about 1800 pounds, and were unsound and spoiled: that being obliged to sell them at a sacrifice, he had lost, by the deficiency in quantity and by the bad quality of the article, \$187. The defendants answered separately. Death stated that he was a partner of the firm of James F. Death & Co., and that the firm sold to the plaintiff the hams in question; that the firm did not warrant the quality of the hams, but that they were selected from a large quantity belonging to the firm, by the defendant, Jas. H. Teasdale, who was not a member of the firm, nor interested in the hams, nor in the sale of them to the plaintiff; but was a person employed by the plaintiff himself, to select for him the hams which Teasdale should judge to be of a good quality. The answer states, that the hams, after being selected by Teas-

(a) Gen'l Stat. of 1865, chap. 165, § 36; Wagner's Stat., p. 1019.

(b) *Id.* chap. 168, §§ 1-3; Wagner's Stat., p. 1033.

dale, were weighed by the city weigher, and amounted to the quantity with which the plaintiff was charged, and for which he paid. The defendant, Teasdale, in his answer, denied that he had any interest in the hams sold to the plaintiff, and stated that he was employed by the plaintiff, to examine some hams that the plaintiff was about to purchase from Jas. F. Death & Co., and to select such as were good, and that he did, at the request of the plaintiff, make the selection, and had no further concern in the transaction.

At the trial, it appeared, that at Cincinnati the hams were opened, and that some of them were injured and spoiled. The deficiency in quantity is supposed to be proved by the difference between the quantity sold there and the quantity charged to plaintiff here. It conclusively appeared, that the defendant, Teasdale, was not a partner of Death & Co., and that he was not interested in the sale between that firm and the plaintiff, and that he had no other part in the transaction than in selecting the hams at the request of the plaintiff.

After the evidence closed, the court instructed the jury :

1. That all the allegations in the plaintiff's petition, which are not specifically denied, are to be taken as true, unless they have expressly denied in their answer, that they have no knowledge nor information sufficient to form a belief.

2. If the jury believe from the evidence, that the plaintiff bought of Death or Death & Co., the hams in question, [* 273] and that said hams were *bought on the representations of said Death or Death & Co., said hams to be of a stipulated quantity and quality, and said hams were of inferior quality or deficient in quantity, they will find for the plaintiff as against the defendant, Death.

3. If the jury believe from the evidence that the plaintiff bought the hams, relying upon the inspection of Teasdale, and that said Teasdale did not fairly inspect said hams, and that said hams were unsound or of inferior quality to those contracted for, the jury will find for the plaintiff as against said Teasdale, one of the defendants, for the damages sustained by the plaintiff in consequence of the inferior quality of the hams.

4. That if the jury believe from the evidence, that the plaintiff agreed to purchase said hams on the judgment of Teasdale, and that Teasdale did not inspect the said hams, but failed to do so, and that said hams at the said time were unsound, then they ought to find for the plaintiff.

5. The jury, if they believe that the evidence so requires, may find for one defendant and against the other.

6. If the jury find for the plaintiff, the measure of damages is the difference between the amount paid, and the price which should have been paid for the hams delivered, estimating the hams delivered, at their real value, both as to quantity and quality.

The court, at the request of the defendants, gave these instructions:

7. If the jury believe from the evidence, that the hams in question, were bought of Death or Death & Co., not relying on the representations of Death or Death & Co., but on the inspection of Teasdale, and that Teasdale did inspect the hams, then they will find for the defendant Death, as far as the quality of the hams is concerned.

8. If the jury believe from the evidence, that the hams in question, were bought of Death or Death & Co., said hams to be taken on the inspection of Teasdale, and that Teasdale did inspect them honestly and fairly and properly, then the jury will find for the defendant, Teasdale.

9. The defendant Teasdale is liable only for any damage the plaintiff may have sustained in consequence of any unfair and improper inspection, which the jury may find from the evidence, that said Teasdale made.

10. If the hams were bought, relying not on the representations of Death, but on the inspection of Teasdale, and said Teasdale did inspect the hams, then Death is liable only for the deficiency in quantity, should the jury believe from the evidence that there was a deficiency.

11. If the jury believe from the evidence, that the hams were bought, not on the representations of Death, but on the inspection of Teasdale *and that the hams were so [* 274]

inspected, properly and fairly, then the jury will find for the defendants.

12. If the jury shall believe from the evidence, that the hams were purchased on the sole judgment of James H. Teasdale, and that said Teasdale practiced deceit in his selection, but that said Death had no knowledge or cognizance of said deceit, they will find for the defendant, Death.

13. There is no evidence in this case, to hold the defendant Teasdale liable for any deficiency in the quantity of the hams sold."

The first instruction given by the court, in substance, directs the jury to examine the pleadings of the parties, and determine what allegations of the petition are not specifically denied by the answers, and then to take such allegations as true, unless they find in the answers that the defendants have denied that they have sufficient information to form a belief upon the truth of the allegations.

The 12th section of the 7th article of the act regulating practice, declares, that any material allegation in the plaintiff's petition, not specifically denied in the answer, need not be proved, &c. The effect of this section is to declare what is in issue between the parties, and what allegations are to be taken as confessed. Now although the act is designed to make great and beneficial changes in the modes of proceeding in courts of justice, it is not thought to be a part of the proposed reform that the jury shall determine what issues they are to try, or whether the answer of the defendant, to any allegation in the petition, is sufficiently specific to put the plaintiff upon the proof of his charge. It is now, as it always has been, the duty of the court to tell the jury what questions of fact are to be tried, and what facts stand admitted by the pleadings.(a)

The third instruction given to the jury, must have been given in mere forgetfulness of the charges in the petition. The petition alleges, that Teasdale, jointly with Death, sold the hams to Butcher, and they were different in quantity and of unsound quality.

(a) Steil v. Ackli, *post.* p. 289.

This third instruction tells the jury, that although Teasdale may have had no interest in the sale, yet, if the jury find that Butcher purchased the hams, relying upon the inspection of Teasdale, and that Teasdale did not fairly inspect them, and that they were unsound, or of inferior quality to those contracted for, then the jury should find for the plaintiff against Teasdale, for the damages sustained in consequence of the inferior quality of the hams. A verdict for the plaintiff, on this petition, is a finding that Teasdale sold the hams to Butcher; but in this instruction, the jury are required to find for the plaintiff, not upon a sale, but upon an unfair *inspection made by Teas- [* 275] dale, of another man's property, sold by such third person to the plaintiff. The act of 1849, regulating practice, allows amendments, even at the trial, in order to conform the petition to the proof, and avoid a nonsuit on account of a variance. Still, the law remains as before, that the cause of action, for which the plaintiff recovers, is to be the same cause of action which he charges against the defendant, and which must be stated, either in the original or in an amended petition. The instruction, that upon this petition a verdict could be rendered against Teasdale, for unfairly inspecting the hams sold by Death, could only have been given through inadvertence, in the hurry of a jury trial. (a)

If the plaintiff had amended his petition, so as to charge Teasdale with a failure to perform his engagement to inspect the hams of Death, and had claimed damages from him on that account, while he claimed damages from Death as the seller, on account of a deficiency in weight, and on account of the bad quality of the hams, he would probably have encountered some difficulty in showing that these two causes of action, on different contracts made by different defendants, could be joined in the same petition.

The judgment, with the concurrence of the other Judges, will be reversed, and the cause remanded to the court of common pleas for further proceedings.

(a) *Irwin v. Chiles*, 28 Mo. 576; *Callaghan v. McMahan*, 33 M. o. 111
Jones v. Londerman, 39 Mo. 287.

Wing v. Campbell. 15 Mo.

WING, respondent, v. CAMPBELL, appellant.

15 Mo. 275.

1. A petition is good which charges an original liability on defendant for services rendered a third person.

Appeal from St. Louis Law Commissioner's Court.

HUDSON, for appellant.

[* 276] *BLENNERHASSETT & SHREVE, *contra*.

RYLAND, J., delivered the opinion of the court.

This was a suit in the Law Commissioner's court upon the following account:

"ST. LOUIS, April 10th, 1851.

THOMAS CAMPBELL, to A. H. WING,	DR.
To board for Presley from March 23d to April 8th,	
making fourteen days, at one dollar per day - -	\$14 00
To dressing and laying out corpse - - - -	5 00
	\$19 00"

The defendant appeared, and filed his demurrer to the petition. The demurrer was overruled, and the defendant making no further answer, judgment was rendered for the plaintiff.

The defendant afterwards moved to set aside this judgment and grant a new trial; which motion was overruled, and the defendant brings the case here by appeal.

We consider that the court below very properly overruled the demurrer. The point attempted to be raised in this case is, that the account against the defendant was for the debt of a third person. The account is for the board of Presley, and for services rendered in laying out his corpse. Presley, for aught
 [* 277] that appears, may have been the *defendant's son or servant, and the defendant may have been primarily liable for such board and services.

Let the judgment be affirmed, the other Judges concurring.

Given v. Cody. Thompson v. St. Louis Perpetual Ins. Co. 15 Mo.

GIVIN, respondent, v. CODY, appellant.

15 Mo. 277.

1. When no instructions have been given or refused—no action of the court complained of, the finding of the jury will not be disturbed.

Appeal from Law Commissioner's Court.

BLANNERHASSETT & SHREVE, for appellant.

MORROW & DELAFIELD, *contra*.

RYLAND, J., delivered the opinion of the court. [278]

This was a case in the Law Commissioner's court. It was tried before a jury; the plaintiff offered evidence and closed his case. The defendant offered no evidence. No instructions were asked, and none were given.

The jury found for the plaintiff; the defendant moved for a new trial on the following grounds: First, because the verdict was against the law; secondly, because the verdict was against the evidence and the weight of the evidence; thirdly, because the verdict of the jury should have been for the defendant.

The case presents the naked question of new trial upon the facts in proof. We will not disturb the finding below. The jury is the proper tribunal to find facts. Where no instructions have been given or refused, no rulings of the court complained of, we again repeat our disinclination to interfere in any such cases. The other Judges concurring, the judgment below is affirmed.

THOMPSON, to use of Buckner, respondent, v. ST. LOUIS PERPETUAL INSURANCE COMPANY, appellant.

15 Mo. 278.

1. *Practice—New Trial—Weight of Evidence.*—Where the case involves only the consideration of the weight of the evidence, the supreme court will not interfere.

Appeal from St. Louis Circuit Court.

GAMBLE & BATES and KASSON, for appellant.

[* 280] WRIGHT, *contra*.

SCOTT, J., delivered the opinion of the court.

All the instructions having been given, which were asked by the the appellant, defendant below, and no instructions having been given at the instance of the appellee, the plaintiff, the case only involves the consideration of the weight of evidence.

When an instruction hypothetically assumes a fact, and the law is declared accordingly, if the jury find against the instruction, it cannot be said that the finding is against the law of the instruction, as it does not appear but that the fact assumed in the instruction was disproved by the evidence.

There being evidence of a promise by the defendant, to pay the damages sustained by the plaintiff, it was a sufficient [* 281] warrant for the *jury to draw the inference, that the loss was occasioned by one of the perils insured against.

This is one of that class of cases with which the court has so repeatedly refused to interfere. (a)

Judge Ryland concurring, the judgment will be affirmed.

SCHULENBURG & Co., defendants in error v. CHAS. GIBSON, plaintiff
in error.

15 Mo. 281.

1. *Mechanic's Liens*.—The Act of February 24th, 1843, in reference to mechanic's liens, which was applicable solely to St. Louis county, repealed only so much of the general law as was repugnant to its provisions.

(a) *State v. Anderson*, 19 Mo. 241; *St. Bt. City of Memphis v. Matthews*, 28 Mo. 248; *Backster v. Hall*, *id.* 593; *Jones v. Plummer*, 29 Mo. 456; *McLean v. Bragg*, 30 Mo. 262; *Thompson v. Russell*, *id.* 498; *Blumenthal v. Torrini*, 40 Mo. 159; *Fangman v. Hersey*, 43 Mo. 122.

But the instructions must be entirely unexceptionable: *Carroll v. Paul*, 16 Mo. 240.

2. *Same—Time for Filing by Contractor.*—Hence, a person furnishing material for a building in that county, under a contract with the owner, must file his lien within six months from the time his demand accrues.^(a)

Error to St. Louis Circuit Court.

GIBSON, for plaintiff in error.

LORD, *contra*.

GAMBLE, J., delivered the opinion of the court. [284]

The only question to be determined in this case is, whether a person furnishing materials for a building in the county of St. Louis, under a contract with the owner, is bound to file his lien within six months from the time his demand accrues in order to charge the building with a lien.

There is probably no part of the law, in which more confusion exists in consequence of legislation, general and local, than on the subject of liens in the county of St. Louis.

The act of 1835, Revised Code 108, gave liens to those who furnished materials or worked upon buildings under contracts with the proprietor. This act was general, operating throughout the State. It provides that the account which was claimed to be a lien, should be filed within six months after the demand accrued. It directed the clerk to provide a book and make an abstract of the liens, filed, and a *description of pro- [*185] perty charged therewith. The mode of enforcing the lien, by an ordinary action or by *scire facias*, is provided, and the effect of the judgment and the form and effect of the execution are substantially prescribed. The time, within which the action must be brought upon the lien, is not prescribed, but it is provided in the 8th section, that no lien shall bind a building for a longer period than twelve months after the building is finished, unless a suit shall have been brought on it in the manner prescribed in the act.

(a) See for General Mechanic's Lien Law for the whole State, including St. Louis county, Gen'l Stat. 1865, chap. 195; Wagner's Stat. p. 907.

The act of February 16th, 1841, was an act to amend the act of 1835, and was likewise general in its operation. By it liens were given to sub-contractors for work and labor and for materials. Provision was made for notice to be given to the owner of the building, by the person performing the work or furnishing the materials previous to performing it, or furnishing the materials, of his intention to do so and of the probable value thereof, and the person wishing to impose the lien, was allowed to settle with the contractor and ascertain by such settlement the amount due for the work and materials, one copy of which was required to be given to the owner of the building; and when the lien was to be imposed a duplicate of the settlement was required to be filed by the sub-contractor, within ten days after the demand accrued, with the clerk of the circuit court. For the duties of the clerk and the mode of the proceeding upon the lien, reference is made to the original act of 1835.

The act of February 24th, 1843, which applies alone to the county of St. Louis, opens, in the first section, with declaring who shall have liens for work done or materials furnished for buildings or other improvements, and extends the liens to persons employed by the owner, agent, contractor or sub-contractor. The 2nd section applies the liens mentioned in the first section, to buildings erected upon leased lots, and subjects the interest of the lessee to liability for the satisfaction of the liens. The 3rd section requires a notice to be given to the owner or his agents, by the person wishing to avail himself of the benefits of the preceding section, that there is such an amount due thereon, and that he intends to hold the building or improvement until the true sum due is paid; a copy of the notice is to be filed with the lien, and the section closes with these words, "but the above limit in regard to notice, shall not extend to persons having contracts with the owner, owners or agent." The 4th section provides, that it shall be the duty of every person who may avail himself of the benefits of this act, to file with the clerk of the circuit court, within six months after notice shall have been given agreeably to section third, a just and true account of the demand justly

[* 286] *due him after all just credits given, which is to be a

lien upon such buildings or other improvements, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply, with the name of the owner or contractor, or both if known, and if not known, then, in that event which ever may be known to the person filing the lien. The 5th section imposes on the clerk the same duties in regard to liens under this act that are required in all the other acts. The 6th section gives a preference to liens for work and materials over all incumbrances, attaching subsequently to the commencement of the buildings. The 7th section provides "that a person wishing to proceed against property charged with a lien by virtue of the act, may commence his action before a justice of the peace when the amount does not exceed ninety dollars, and when judgment is obtained against the owner, agent, contractor, or subcontractor as the case may be, a transcript may be filed in the office of the clerk of the circuit court, who shall thereupon issue execution as in ordinary cases, and the sheriff shall immediately proceed to sell the same as other property on executions is sold." The 8th section provides that in all cases, when the demand shall exceed ninety dollars, the action shall be brought in the circuit court. The 9th section requires that all actions under this act shall be brought within ninety days after filing the lien. The 10th section, like the 8th section of the Act of 1835, provides, that "no lien shall bind a building for more than twelve months after the building is completed; unless a suit shall have been brought in the manner provided in this act." The 14th section repeals "all acts or parts of acts contrary to or inconsistent with the provisions of this act."

It has been thought best to state the substance of this act in its material provisions in order that there may be an accurate idea of what the law is in the county of St. Louis in relation to liens, by ascertaining how much of the general law remained in force after the passage of this special act. This special act still continues in force within the county of St. Louis, as it and other special laws, operating in St. Louis county, were expressly continued at the revision of 1845.

In the first place it is to be remarked, that by the general tenor

of its provisions and by the limited repeal in the 14th section, this act was not designed to be a complete and full act of legislation covering the whole ground of mechanics' liens within the county. It is apparent that much of the system is designed to be left to the general laws: as an instance of this, it provides, that actions for sums over ninety dollars are to be brought in the circuit court, but it does not provide for rendering the act effectual in the enforcement of the lien. The general [* 287] law authorized a general judgment to be rendered in such action, and that execution should issue "against such proportionable part of the property charged with the lien as the plaintiffs demand bears to the whole amount of the liens that are charged upon said property under the act, which proportionable part shall be decided by the court, and also against other property of the defendant." This provision enforced the lien, and it cannot be supposed that the special act was designed to leave persons, having liens in St. Louis county, without the means of enforcing them. The general law must be held still to regulate the remedy and in fact continues in full force in the county in all its provisions not inconsistent with the special law.

The provisions in the third section in requiring a notice to the owner of the property or his agents, that a certain sum is due to the person who has worked on, or furnished materials for the building, and that he intends to hold the building or improvement until the sum is paid, would seem by its own terms, to be applicable only to sub-contractors, and not to the person with whom the owner has dealt in relation to the erection of the building; for as the dealing between the owner and contractor are as much known to one party as to the other, no notice as between them is necessary, either of the amount due or of an intention to claim a lien. But the last clause of this section expressly declares, that the limit as to notice shall not extend to persons contracting with the owner. This language does not imply that there is some notice required between contractor and owner, with a different limitation of time from that fixed in this section, which is thirty days after the indebtedness accrued or completion of the building, but excludes the idea that notice within any given time is required

between such parties. This section then in its operation is confined to sub-contractors. As the 4th sec., which directs the acts to be done in order to impose the lien upon the land, requires the demand to be filed within six months after giving the notice, according to the third section, as it requires that in addition to the description of the property to be charged with the lien, the person filing the demand shall state the "name of the owner or contractor or both if known," it can apply only to sub-contractors. This fourth section is the most important part of the act, in showing the class of liens which the act was designed to enforce; for it comprehends in its directions all that is required to be done in placing the demand upon record in order to charge the property, and these directions are inapplicable to a demand asserted under a contract directly with the owner of the property.

There are some subsequent provisions in the act, in which the language is general, and which may be held to be alterations of the general *law; such as the 6th section [* 288] which gives a preference to the lien for work and materials over all incumbrances, subsequent to the commencement of the building. These subsequent clauses do not touch the questions arising in this case.

This act leaves the person who performs work or furnishes materials under a contract with the owner, to pursue the general law in imposing the lien upon the property. We have seen that all the directions of this act apply to other persons than the contractor, and consequently the general law is in no sense inconsistent with this act, when it is left to prescribe the course to be pursued by contractors.

Again, although this special act was continued in force at the revision of 1845, any change in the general law, made at the time of that revision, would be operative in the county of St. Louis if not repugnant to or inconsistent with the special act, so that the law regulating the liens, for work done and materials furnished for buildings in the city and county of St. Louis, is to be found in the special act and the revised law of 1845; the special act being the one to be enforced whenever they are inconsistent. Taking the general law then, as the rule governing the proceedings

required to impose a lien for work done or materials furnished under a contract with the owner, we find that the person who furnishes materials and intends to hold the property chargeable for the demand, must file a just and true account of the amount due him "within six months after the materials shall have been furnished:" Rev. Code 733, section 2.(a)

In the present case, the last item of the account for the materials furnished, was on the 4th of January, 1850. The demand was not filed until the 29th of August, 1850, being more than six months after the furnishing of the materials and the accruing of the plaintiff's demand. This was too late in order to make the demand a lien upon the property.

The judgment of the circuit court was rendered against the defendant, Boecker, as the person indebted to the plaintiffs. The defendant, Gibson, claiming the property under Boecker voluntarily appearing and waiving a scire facias, the case was submitted upon an agreed state of facts between him and the plaintiffs. The question of law arising upon the agreed facts, was, whether the demand was a lien upon the property. The court gave judgment for the plaintiffs and awarded execution against one-fifth of the property. The judgment against the property and the award of execution are reversed; the other Judges concurring.

JOHN STEIL, respondent, v. JOHN ACKLI, appellant.

15 Mo. 289.

1. It is the duty of the court to tell the jury what facts are admitted by the pleadings. *Butcher v. Death & Teasdale*: *Ante*. p. 271.

Appeal from St. Louis Circuit Court.

[* 292] *GIBSON, for respondent.

GAMBLE, J., delivered the opinion of the court.

In this case the judgment must be reversed, and the only ground

(a) *Clark v. Brown*, 25 Mo. 562; *Wibbing v. Powers*, *id.* 599.

upon which it is reversed is the giving of the sixth instruction, in these words: "All averments in the petition, not denied in the answer, are to be taken as admitted, but every averment in the petition which is denied is not evidence, nor is the denial of the averment in the answer evidence, but all averments when denied and the denials also, are to be supported by proofs or disregarded by the jury."

It has already been decided, at this term, in the case of *Butcher v. Death & Teasdale*, that it is the duty of the court to tell the jury what facts, stated in the petition, are to be taken as admitted, because the defendant has failed to deny them; and that it is error for the court to leave to the jury the task of sifting the pleadings to find what facts are stated on one side and specifically denied on the other, so as to make an issue which they are to determine by the evidence.

The judgment will be reversed and the cause re- [* 293]
manded for further proceedings, the other Judges con-
curring.

THE STATE OF MISSOURI to the use of Taylor, plaintiff in error,
v. COLLIER, defendant in error.

15 Mo. 293.

1. *Evidence—Burden of Proof.*—In an action against an administrator *de bonis non*, the burden of proof is upon the plaintiff, to show the amount of assets that went into his hands, and a failure to account for them.

Error to St. Louis Court of Common Pleas.

COBB, for plaintiff in error.

*DICK, *contra*.

[* 294]

SCOTT, J., delivered the opinion of the court.

This was an action on an administration bond against Collier, as security for P. H. Engle, administrator of Jas. Taylor deceased. The breaches assigned were, the non-payment of a distributive

share of the estate of Martha Taylor, one of the distributees of said estate; a failure to account for \$1,000, due on a bond given to the deceased by Kimwell & Clodfelter, and placed in the hands of an attorney for collection; a mistake of one hundred dollars in making his annual settlements, and divers other palpable breaches. On issue joined, the plaintiff submitted to a nonsuit after the refusal of the instructions asked by him, and one given at the instance of the defendant. The plaintiff, having unsuccessfully moved to set aside the nonsuit, has brought the case to this court.

The instructions asked by the plaintiff are substantially as follows, and grow out of the breaches assigned in the declaration.

The first is, that if the administrator neglected to pay [* 295] a sum, ordered by the *court to be paid to Martha Taylor, for whose use the suit was brought, the jury will find for the plaintiff. That the burden of proof of the payment is on the plaintiff; that if the administrator received a thousand dollars on Kimwell & Clodfelter's bond, which he failed to account for, they will find for the plaintiff; that if there is the sum of \$100 improperly credited, by mistake, to the administrator in his settlements, the jury will find for the plaintiff. The last instruction is not mentioned, as it grows out of a breach not properly assigned; on which, consequently, there could be no recovery. At the instance of the defendant, the court instructed the jury that on the evidence there could be no recovery by the plaintiff.

The annual settlements of Engle as administrator and an additional inventory of the estate of the deceased, filed by a former administrator, were given in evidence, and his bond, letters of administration and his affidavit, stating who were the heirs and distributees of the deceased. There was no evidence that Kimwell & Clodfelter's bond was ever in the possession of Engle. It is mentioned in the former administrator's additional inventory, and from a memorandum thereon endorsed it appears that it was placed in the hands of the attorney by the deceased, James Taylor. The record of Engle's settlements shows that the amount with which he was charged consisted of uncollected debts, \$3,327.60, and by a memorandum on his last settlement it appears how much he

received on Kimwell & Clodfelter's bond, which was a thousand dollars less than the amount due on them, according to the additional inventory of the former administrator.

As to the distributive share of \$625 ordered to be paid to Martha Taylor, the non-payment of which is assigned as one of the breaches of the condition of the bond, it may be observed that the record offered in evidence by the plaintiff shows that all the moneys ordered to be distributed amongst the heirs of James Taylor were paid to their attorney in fact, and his receipt therefor filed amongst the papers of the administration.

Kimwell & Clodfelter's bond being placed in the hands of the attorney by Taylor himself, it does not appear how that matter stood at the time Engle took out letters of administration. Whether payments had been previously made, is not shown. The documents offered in evidence by the plaintiff, prove that he acknowledged the receipt of a sum a thousand dollars less than was due, according to the additional inventory. For the sum received, Engle accounted. If there was more due on the bond than was received, or if more was received than was *accounted for, the burden of proof was on the plaintiff. [* 296] She impeaches the settlement, and must show the error or mistake.

As to the error of \$100 in the addition, which caused an increase of Engle's credits of that amount, the plaintiff cannot complain, as it appears by the last settlement that the estate is indebted to her in the sum of \$150.

The question as to the propriety of this mode of procedure, is not determined, as the cause has been heard on the merits and decided against the plaintiff.

The other Judges concurring, the judgment will be affirmed.

HUGHES, plaintiff in error, v. McALISTER & Co., defendants in error.

15 Mo. 296.

1. *Notes—Innocent Owner*—One, who, acting with ordinary prudence, has innocently acquired a right to certain notes through the negligence of him who has the prior title, will hold them against such prior owner.

Error to St. Louis Court of Common Pleas.

GLOVER & CAMPBELL, for appellants.

[* 302] *FIELD, *contra*.

SCOTT, J., delivered the opinion of the court.

We are satisfied from the evidence preserved in the record, that McAlister & Co. had an equitable right to the proceeds of the judgment which are now in controversy. That right existed prior to the assignment made to Hughes, and must be enforced, unless McAlister & Co. themselves, or by their attorney, have manifested such negligence and inattention to the interests of others, as will induce a court to postpone their priority to the rights of those subsequently acquired. One having a right to property, like that now the subject of dispute, must act with that degree of caution, in making known his claim, as will prevent others, in ignorance of their rights, from innocently making advances upon the faith of it. If by his negligence, men, acting with ordinary prudence, have, in good faith, obtained a right to the property, he cannot complain if he should be postponed to them. McAlister & Co. had in their possession the notes on which the judgment was obtained; they might have sued on them in their own names; they suffered them to pass out of their hands, their names as the last endorsers to be erased; suit to be brought in the name of Ball; they become sureties in the attachment bond in which it is recited, that the suit was about to be brought in the name of Ball, without any intimation that it was for their benefit. The attorney, who brought the suit, is so informed as to their rights,

[* 303] *that he told one of the parties, that there had been no

assignment since the suit was brought; that he thought, at the institution of the suit, the notes were Ball's, and under these impressions, actually drew the assignments which have given rise to this controversy. This chain of circumstances shows such a degree of negligence, on the part of McAlister & Co., as must postpone their claims to those of the innocent assignees who have advanced their money to Ball on the faith of this paper. That Ball has acted faithlessly towards McAlister & Co. cannot avail them. Others should not be visited with the consequences of their misplaced confidence. When one has a claim to promissory notes, payable to another, whose claim is evidenced by possession alone, he cannot, with safety part with that possession, without attaching to the instruments, in some way, notice of his rights. If he does, he cannot deem it a hardship if his claim is postponed to a subsequent *bona fide* assignee. The course of the assignees is marked with that degree of caution which characterizes the conduct of prudent men in the transaction of business. Seeing the suit on the notes in the name of Ball, they are unwilling to deal with him on the faith of that circumstance alone, but go to the attorney who instituted the suit, and from him obtained such information as satisfies them of Ball's right to the notes; they then close the bargain, and have the assignments drawn by the very attorney himself, who brought the suit. The other Judges concurring, the judgment will be reversed, and the money in the hands of the sheriff will be distributed among the assignees, according to their rights as appears from the record, and in order specified in the assignment to Heiskell & Co.

BANK OF MISSOURI, appellant, v. JAS. M. FRANCISCUS, respondent.

15 Mo. 303.

1. *Trespass*.—If a judgment was valid at the time it was rendered, and proceedings have been taken under it, and it is afterwards set aside, the avoidance does not, by relation, affect the proceedings, and make those who instituted them trespassers *ab initio*.
2. *Discharge in Bankruptcy*.—A bankrupt sued for a debt contracted before

his bankruptcy, must plead his certificate of discharge in bar of the action.^(a)

Appeal from St. Louis Circuit Court.

POLK, for appellant.

LORD, *contra*.

[* 308] *SCOTT, J., delivered the opinion of the court.

This action is evidently founded upon a misconception of a principle of law. That principle is thus stated in 7 Comyn's Dig. 499: "If a man has color of an authority, and afterwards it is vacated and declared to be null, he will be a trespasser *ab initio*; as if a man obtained judgment irregularly, and afterwards takes out execution, the party (though not the officer) will be a trespasser if the judgment be vacated." It may be remarked, that the term "irregular," as used in the old books, is synonymous with the word void. *Parsons v. Loyd*, 3 Wel. 341. The principle, as stated, is not controverted, and is abundantly sustained by the references. If we are not mistaken, the rule will be found applicable to those cases only, in which the cause for vacating the judgment exists at the time of its rendition. Certainly there is nothing in the cases cited, and they have all been examined, which will warrant the inference, that if a judgment is valid at the date of its rendition, and proceedings have been taken under it, and it should be afterwards set aside, that avoidance by relation will affect those proceedings. We do not conceive that a judgment, once regular, can be vacated; it may be satisfied or extinguished, but we cannot see the end to be obtained by its vacation. If, through inadvertence, an order should be made, vacating such a judgment, on no principle can that act have any retrospective effect. It will not be maintained, that a judgment against a bankrupt, merely because he is such, is even erroneous, much less void. If a bankrupt has obtained his discharge and certificate, and is sued for a debt contracted before his bankruptcy, and he fails to

(a) See *Reed v. Vaughan*, *ante*. p. 137.

plead his discharge in bar, the judgment obtained against him, under such circumstances, will be as valid as any ever pronounced in a court of record. This court, in an opinion which was amply sustained by authority assented to the doctrine, that an action of trespass cannot be maintained against a sheriff for arresting the body of a certificated bankrupt.^(a) The only reason for interfering with the judgment and the proceedings thereon, in which this action originated, was, because the plaintiff, Franciscus, had not obtained his certificate at the date of the judgment. He had instituted proceeding to obtain the benefit of the bankrupt act, and it was held, that the decree in bankruptcy related back to the time of filing his petition, protecting his after acquired property. A debt due by a bankrupt, contracted before his bankruptcy, is like any other debt against which he has a valid defense. If sued for it, and he fails to plead his certificate, he is in the same situation as all others who have neglected to plead their defense to an action prosecuted against them. *That he had [* 309] not obtained his discharge, so that it might have been pleaded in bar, during the pendency of the suit, does not affect the validity of the judgment. When the judgment was rendered, it was not known that the certificate would ever be obtained, and if obtained that it might be avoided for fraud, or by showing that the debt was of a character that could not be discharged by the bankrupt act. In such a state of things, a court of equity, or the court in which the judgment was rendered, would stay the proceedings,^(b) but surely would never vacate the judgment until the creditor had been afforded an opportunity of contesting the validity of the discharge; and if, through inadvertence, such an order should be made, it could have no retrospective effect.^(c)

The demurrer to the replication should have been sustained. The other Judges concurring, the judgment will be reversed.

(a) *State v. Hamilton*, 9 Mo. 794.

(b) Bankrupt Act of March 2d, 1867, § 34.

(c) *Young v. Bircher*, 31 Mo. 136.

Bates & Wise v. The Bank of Missouri. 15 Mo.

BATES & WISE v. THE BANK OF MISSOURI.

15 Mo. 309.

Deed—Description—Parol Evidence.—However vague the description in a sheriff's deed of land sold under execution, parol evidence is admissible to identify the premises, and show that in the community where the sale took place, they are known by the description given. Such evidence does not fall within the rule which rejects oral testimony in explanation of a patent ambiguity.

Error to Hannibal Court of Common Pleas.

PLATT & REED and E. BATES, for plaintiffs in error.

[* 311] *DRYDEN, GLOVER & CAMPBELL, *contra*.

SCOTT, J., delivered the opinion of the court.

This was an action in the nature of an ejectment, begun by the respondent in the Marion circuit court, which was afterwards taken by a change of venue to the Hannibal court of common pleas, in consequence of the judge of the circuit court having been counsel in the cause. The respondent recovered judgment, upon which the proceedings were brought to this court by the appellants.

The appellants claimed the premises under a sheriff's deed to Bates, which described them as "all the right, title, interest and claim of William Muldrow, William Wright, John McKee and Uriel Wright in and to thirty-five acres and seventy-five hundredths acres of land, being a New Madrid claim, No. 2,592, part of the southwest quarter of section 25, township 58, range 6 west." The execution under which the sheriff's deed was made, was directed against Wm. Wright and the other parties above named. The issue in the cause was submitted to the court for trial. After reading the deed on which they relied in defense, the appellants offered oral evidence identifying the land therein mentioned and tending to show that the premises conveyed were known by the description given them. This evidence was rejected. The court,

[* 312] *at the instance of the respondent, in substance declared the law to be, that the deed offered in defense of the action was inoperative and void; that the deed to Bates conveyed

no title, and that parol evidence to explain a *patent ambiguity* in the deed was inadmissible.

This court has repeatedly held, that however vague a description of the land sold under execution a sheriff's deed might contain, yet parol evidence is admissible to identify the premises and show that in the community in which the sale takes place they are known by the description given. The object of a description is to prevent imposition and a sacrifice of the property. If the subject of the sale is described so as to prevent these consequences, the law is satisfied: *Hart v. Rector*, 7 Mo. Rep. 531; *Landis v. Perkins*, 12 Mo. Rep. 238.

Parol evidence whose aim is to identify the premises conveyed by a deed, or to ascertain a subject matter to satisfy the description, does not fall within the rule which rejects oral testimony in explanation of a patent ambiguity. Greenleaf says that if, in the conveyance of an estate, it is designated as Blackacre, parol evidence must be admitted to show what field is known by that name. Upon the same principle, where there is a devise of an estate purchased of A, or a farm in the occupation of B, it must be shown by extrinsic evidence what estate it was that was purchased of A, or what farm was in the occupation of B, before it can be known what is devised. So, if a contract in writing is made for extending the time of payment of "certain notes" held by one party against the other, parol evidence is admissible to show what notes were so held and intended. (a)

The other Judges concurring, the judgment will be reversed, and the cause remanded.

OVERTON, adm'r of Overton, dec'd, plaintiff in error, v. MCFARLAND, adm'r of McFarland, dec'd, defendant in error.

15 Mo. 312.

Administration—Circuit Court—Control over County Court.—The sixth section of the act establishing courts, Revised Code, 330, giving to the

(a) Same case, 17 Mo. 583; *Hardy v. Matthews*, 33 Mo. 121; *Webster v. Blount*, 39 Mo. 500.

circuit courts, "a general control over executors, administrators, guardians, &c., to be exercised according to the rules, usages, and practice of courts of equity," (a) is not to be so construed as to absorb the powers conferred by the 13th section of the same act upon the county courts. While an administration is pending in the county court, the circuit court has no power to compel the administrator to inventory property charged to belong to the estate.(b)

[* 313] **Error to New Madrid Circuit Court.*

COOK, for plaintiff in error.

GLOVER, *contra*.

GAMBLE, J., delivered the opinion of the court.

The plaintiff in error filed a petition in the circuit court of New Madrid, alleging that her intestate, Benjamin P. Overton, in his life time, recovered a judgment in the circuit court of New Madrid against Elias G. McFarland, the intestate of the defendant in error; that the defendant James A. McFarland, administered upon the estate of Elias and returned an inventory of the effects of his intestate, amounting only to the sum of \$88.50, although the administrator then had in his own hands several slaves and other personal property belonging to his intestate's estate, worth more than \$2,000, a part of which he had subsequently sold. The petition prays that an order may be made requiring the defendant to inventory and account for so much of said property as remained in his hands, as assets of his intestate and that he account for the proceeds of such part as he had sold, and that he be enjoined from selling any more.

An amendment was made to the petition or rather an addition to its prayer, in which the petition prays that the defendant may be required to discover the title under which he claims the property and refuses to return it in his inventory, and that if he claims it as his own property, that he discover and set forth the consideration given by him on the purchase thereof—that he set

(a) Gen'l Stat. of 1865, chap. 136, § 2; Wagner's Stat. p. 431.

(b) *Id.* chap. 137, § 7; Wagner's Stat. p. 440.

forth whether he was not indebted to his intestate, and generally, that he discover all the assets of his intestate.

A demurrer was filed to the petition, and the defendant assigned for cause, that the circuit court had no jurisdiction of the subject matter of the action. The demurrer was sustained and the petition dismissed, and the cause comes before this court to determine the question of the jurisdiction of the circuit court. [314]

It is to be inferred from the petition, that the administration upon McFarland's estate, is still an open unsettled administration, as the petitioner seeks to have property inventoried by the administrator as property of the estate and accounted for as such. He does not ask that this shall be done in the circuit court but invokes the aid of the circuit court in order that it may be done in the county court.

If the power here claimed for the circuit court, will, in any degree, interfere with the exclusive original jurisdiction, expressly conferred by the legislature upon the county courts, it cannot be exercised. Although the sixth subdivision of the sixth section of the the act establishing courts, Revised Code 330, gives to the circuit courts "a general control over executors, administrators, guardians, &c., which is to be exercised according to the rules, usages and practice of courts of equity," yet this control is not to be so employed as to absorb the powers conferred by the thirteenth section of the same act upon the county courts.

In *Erwin v. Henry*, 5 Mo. R., 469, it was held that the fifteenth section of the act of 1835 did not confer upon the county courts exclusive jurisdiction of a proceeding against an administration for waste of the intestate's estate, and that a court of equity had concurrent jurisdiction with the county court, in all the subjects specified in that section except the first.

In *Miller v. Woodward & Thornton*, 8 Mo. 169, so much of the decision in *Erwin v. Henry*, as maintained the jurisdiction of a court of equity in the matters specified in the clauses of the section giving jurisdiction to the county courts, was overruled. It was there held that all the clauses of the section, except the seventh (which relates to the allowance of demands against the

estate), were exclusive and that the general control over executors, administrators, guardians, &c., conferred upon the circuit court, by the sixth clause of the eighth section of the act, was not to be understood as interfering with the grant of exclusive original jurisdiction, made to the county courts. The case of Clark and wife v. Henry's adm'r, 9 Mo. R., 340, which is the same case in which the first decision was made, asserts the jurisdiction of a court of equity, to determine a case of alleged waste and mismanagement of an estate after it had been finally settled in the county court, and when of course the jurisdiction of that court had been exhausted.

[* 315] The powers conferred upon the county courts, by the fifteenth section of the act of 1835, establishing courts of justice, are continued in those courts by the thirteenth, fourteenth and fifteenth sections of the corresponding act in the revision of 1844: Revised Code, 331. The phraseology of the two acts is the same in all that concerns the present question.

There is nothing in any decision that has been made, that will warrant the interference of a court of equity in a case like the present. Here the administration (as must be intended from the petition) is still in progress before the county court, and that court is competent to hear and determine the controversy respecting the duty of the administration in relation to the property mentioned in the petition, and has exclusive original jurisdiction of such question. The petition seeks the interference of the circuit court to try the right to the property, and if found to belong to the estate of the intestate, then to compel the administrator to return it in his inventory, and administer it as assets of the estate. The circuit court has no such power.(a)

The judgment of the circuit court, in sustaining the demurrer of defendant and dismissing the petition was correct, and is affirmed.

(a) Powers v. Blakey, 16 Mo. 437.

FINE, respondent, v. ROGERS, appellant.

15 Mo. 315.

1. *Instructions—Error.*—The correctness of the action of the court below, in giving or refusing instructions, will be examined, though not made a ground of error in a motion for a new trial.
2. *Contract—Rescission.*—The rescission of a contract may be proved by the acts and declarations of the parties, though no distinct proposition to rescind made by either party can be shown.

Appeal from St. Louis Court of Common Pleas.

SPALDING & SHEPLEY, for appellants.

TODD & KRUM, *contra*.

GAMBLE, J., delivered the opinion of the court. [319]

Before proceeding to examine the instructions in this case, it is necessary to dispose of a preliminary question.

The point is made that because the giving and refusing instructions was not made a ground for the motion for a new trial, this court in accordance with former decisions, will not examine into the correctness of the action of the court below, either in giving the instructions asked by the plaintiff or in refusing that asked by the defendant.

It has been the practice of this court, to regard errors of the circuit courts in the decisions made during the progress of a trial as waived by the party against whom the error was committed, unless there was a motion for a new trial made, and the error of the court upon the specific point assigned as a reason for the motion. But the law has been thrown into some confusion by the statute to reform pleadings and practice in courts of justice. In the last clause of the 3rd section of the 11th article of that act, there is an enumeration of cases in which the courts of original jurisdiction are required to grant new trials. The cases are surprise, misdirection by the court, mistake by the jury, the verdict being contrary to instructions, fraud or deceit practiced upon either party, or mistake or perjury of a witness. It is commanded, that if the court shall be satisfied that an improper verdict has

been occasioned by either of these causes, and that the party has a just cause of action, or defense, a new trial shall be granted, and if necessary the pleadings shall be amended.

It cannot have been the intention of the legislature by this enumeration of causes for which a new trial may be granted, to exclude other causes as the ground for the exercise of this power. It cannot have been intended that the circuit courts should no longer have power to grant new trials on account of the improper admission or rejection of evidence, or when the verdict found under the influence of passion or prejudice is contrary to evidence, or when the damages are excessive, or when the jury have been guilty of misbehavior, or when there is newly discovered evidence, that would have materially affected the verdict. It is not to be believed that there was any design to limit the necessary control of courts over the verdicts of juries, nor is there any necessity

[* 320] *for so constructing this part of the statute as to produce that effect. To give it any force, however, it must be taken to have given additional emphasis to the obligation of the courts, to grant new trials in the enumerated cases. There is no direction as to the mode in which an application for the new trial is to be made, and if this is to be in accordance with the former statute, still the rules that would formerly have governed the court are not the same that are to be applied under this act, for new trials are to be granted under its direction even where the case made in the pleadings is not sustained by evidence, and where it will be necessary to amend the pleadings after the new trial is granted, in order to sustain the action or defense. (a)

It is to be observed, that many of the grounds specified in this clause of the act are common, familiar reasons for new trials, and others, if not entirely new, are of exceedingly rare occurrence. An application for a new trial on the ground that a particular witness had committed perjury at the trial, would present a question of great delicacy to the court before which the trial took place, when not only the evidence contradicting the witness, but his manner and all circumstances calculated to discredit it or to sus-

(a) Leahy v. Dugdale, 41 Mo. 517.

tain his testimony were known to the court. If such questions were brought before this court, where nothing can appear but the inconsistencies in the testimony given by the witness and the contradiction of his testimony by other evidence, as the whole matter would be spread on a bill of exceptions drawn by the counsel of one of the parties, there would be the greatest danger of doing injustice to the parties and to the character of the witness implicated.

It may be assumed to be the pervading spirit of the code to decide cases upon all questions of law and fact, without any adherence to forms. The 6th section of the 19th article, allows bills of exception to be taken to all opinions of the circuit courts in the progress of trials as heretofore. The exceptions thus taken are intended to bring these opinions and decisions before the court for revision, and we think it is most consistent with the design of the legislature to give the parties the benefit of such review without requiring any motion for a new trial to be made. (a) The propriety of this change of practice is the stronger, from the fact, that the court impressed with a sense of the danger of the rights of parties in the exercise of such jurisdiction, has declined considering motions for new trials when they rest upon the question of the verdict's being against evidence, or the weight of evidence. (b)

Proceeding then to the consideration of the instructions in this case, it is the opinion of the court that the third instruction taken by itself was calculated to mislead the jury.

That a parol contract may be rescinded by the parties [321] while executory, without a formal release, is a familiar principle of law; and that such rescission may be inferred from the acts of the parties, is equally clear. Very slight circumstances will be sufficient to show the assent of a party when it is obviously for his interest that the contract should be terminated; as in the present case, when the steamboat on which the plaintiff was engaged, was withdrawn from business and laid up, the crew paid off and dis-

(a) *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 496; *Gray v. Heslep*, 33 Mo. 233. But see *State v. Marshall*, 36 Mo. 400.

See references to *Thompson v. St. Louis, &c., Ins. Co.*, *ante* p. 278.

charged, and the contract with the plaintiff entitled him to the same compensation, whether the boat was running or not. In such case an offer, on his part, to rescind, and his subsequent acts, only justifiable on the ground that a rescission had taken place, would well authorize a jury to find such rescission.

By the third instruction the attention of the jury would naturally be directed to the conversation between Fine and the witness Maline, and when they were told, that in order to make a relinquishment of the contract valid, it must be proved by the defendant that it was made to a person competent to assent to it, and that such person did assent to it and accept it, or that the plaintiff refused to act under the contract, they would infer that if Maline had no power to make the agreement to rescind, then there was no rescission.

This instruction thus understood, would have led the minds of the jury away from the consideration of the acts of the plaintiff in going on board the Monroe and acting as her pilot, from which, connected with his declarations, the jury might have well believed that the contract was rescinded. Because the instruction might have made such impression on the mind of the jury, it has endangered the judgment in the case, but on a close examination of the fifth instruction, we think the error of the third is cured as it states the facts that would prevent a recovery by the plaintiff.

The fifth instruction informs the jury, that if the plaintiff agreed to rescind and acted on that agreement with the assent and acquiescence of the defendant, there can be no recovery for services subsequently offered to be rendered. This instruction gives proper force to the acts of the plaintiff, and being understood by the jury would present the question of fact to be tried by them fairly for their consideration.

It is undoubtedly true that the rescission of a contract may be properly found, although no distinct proposition to rescind made by either party, can be shown. Their acts and declarations may establish the fact as satisfactorily as the most distinct evidence.

The refusal of the defendant's instruction did not prejudice him. Although it applied the principles of law, expressed in

the fifth instruction *given for the plaintiff, to the facts [* 322] in evidence, and was therefore preferable in form, yet it did not differ in the principles of law it contained from the fifth instruction.

The judgment will be affirmed, the other Judges concurring.

MOSELY & WIFE to use of Beach & Eddy, appellants, v. HUNTER,
respondent.

15 Mo. 322.

1. *Statutory Covenants—Damages.*—For the breach of the statutory covenants, the recovery can only be for nominal damages, unless there has been an eviction. 10 Mo. Rep. 467; 12 *id.* 344.
2. *Breach of Covenant—Evidence—Damages.*—In an action for a breach of covenant, against incumbrances, it is competent for the plaintiff to show that an incumbrance, which existed when the covenant was made, has ripened into an adverse and superior title, and that there has been an eviction made under it since the institution of the suit.

Appeal from St. Louis Court of Common Pleas.

TODD & KRUM, for appellants.

*HUDSON, *contra*.

[* 328]

GAMBLE, J., delivered the opinion of the court.

The words “grant, bargain and sell,” when used in a deed made in Illinois to convey land in that State, are to be held to contain express covenants “that the grantor is seized of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns.” Such is the effect of their statute.

In this case, breaches are assigned of each clause of the first covenant, by alleging that Hunter was not seized of an indefeasible estate in fee simple, and that the land, at the date of the deed, was subject to the incumbrance of an attachment previously levied upon it as the property of Hunter.

To sustain the first breach, the plaintiff gave in evidence certain documents to prove outstanding titles under the revenue laws of Illinois, at the time the deed by Hunter was made. The proceedings under the revenue laws of that State resulted in two deeds made by auditors of the State; one to Benjamin Mills, [*329] the other to R. H. Peebles. These *deeds, as well as all the evidence offered by the plaintiff, were at first admitted by consent, subject to objections to be afterwards made by defendant's consent, and upon such subsequent objections the deeds were excluded from the consideration of the court sitting as a jury. Upon the first breach, there were also read in evidence by the plaintiff, two patents from the United States, dated on the 14th day of February, 1818, to the soldiers to whom the land was originally granted by the government (it being within the district of bounty lands), and then gave evidence for the purpose of showing that there were no deeds on record from the original patentees.

It appeared in evidence that the plaintiffs went into possession under the deed from Hunter, which is the foundation of this action, and there was no evidence that they had ever been disturbed in that possession by any person claiming title to the land, either under the deeds made by the auditors of the State, or under the title supposed still to exist in the original patentees or their representatives. As the plaintiffs have recovered in the court below more than nominal damages, and as this court has held in the case of *Collier v. Gamble*, 10 Mo. Rep. 467; *Rees v. Smith's Ex'r*, 12 Mo. Rep. 344, that for the breach of similar statutory covenants, (a) the recovery could only be for nominal damages, unless there was an eviction, there is nothing in the action of the court below in rejecting these deeds which furnishes a ground for the reversal of the judgment. (b)

To sustain the breach on the latter clause of the covenant, charging the existence of an incumbrance by an attachment at the time the defendant made the conveyance, the record from Illinois was read, showing the attachment for the sum of \$110,

(a) Gen'l Stat. of 1865, chap. 109, § 8; Wagner's Stat., p. 274.(b) *Lawless v. Collier*, 19 Mo. 480.

levied upon the land, the judgment, *scire facias*, and sheriff's sale of the property conveyed. A certificate was given to the purchaser, and afterwards a sheriff's deed was made to him, the consideration being five dollars, the amount bid at the sale.

A transcript of the record in an action of ejectment, commenced by the purchaser at the sheriff's sale against the plaintiff, to recover possession of the land, was at first admitted in evidence. This transcript showed that the action of ejectment was commenced before this suit was brought, but that during the pending of this suit the action of ejectment was determined, and resulted in a recovery by the purchaser at the sheriff's sale, and an eviction of the plaintiff in this suit. The court below, on motion, excluded all of said record that showed facts occurring after the commencement of this suit.

The only purpose for which this record was admissible at all, was to *trace the operation of the incumbrance [* 330] existing at the time the defendant conveyed the property, to its ultimate consequence in the loss of the property to the plaintiff.

The breach of the defendant's contract consisted in the existence of an incumbrance at the time he made his deed containing a covenant against incumbrances, and it was competent for the plaintiff to introduce and use evidence of any facts down to the time of the trial of the cause, to show the extent to which he was injured by the defendant's breach of contract. In *Brooks v. Moody*, 20 Pickering, 475, Chief Justice Shaw says: "The question then is, whether in an action for breach of covenant against incumbrances, a plaintiff may recover in damages the amount fairly and justly paid for the removal of such incumbrances, if so paid after the action is commenced, and the court are of opinion that he may. The legal ground of action is not the debt or obligation to pay money, but the breach of the defendant's covenant. This was broken when the action was commenced, and it is not denied that the plaintiff can maintain the action, and as a necessary inducement can recover some damages. The reasons why the covenantee cannot recover full damages without extinguishing the incumbrance, are, first, because he may never be disturbed by the outstanding

incumbrance ; and, secondly, because the defendant, after paying the amount on his covenant, might still be called on by the person holding the outstanding mortgage, on his personal obligation, and so might be twice charged. But both these reasons are obviated when the mortgage has been taken up or extinguished by the plaintiff before the assessment of damages."

The same doctrine is maintained in *Kelly v. Lord*, 18 Maine, 244 ; *Leffingwell et al. v. Elliott*, 10 Pick. 204. In *Wilcox v. The Executors of Plummer*, 4 Peters, 182, the Supreme Court of the United States say: "When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps in that event, no more than nominal damages may be proved, and no more recovered ; but on the other hand it is perfectly clear, that the proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict."

We approve the doctrine maintained in these cases, as consonant with the rules of law and the dictates of sound reason. The plaintiffs were entitled to their action as soon as the covenant against incumbrances was made, if a valid incumbrance then existed, and if, pending such action, the incumbrance had ripened into an adverse and superior title and an eviction under [* 331] it had taken place, there would be no propriety *in preventing them from tracing the breach of the defendant's contract to its ultimate effect, although it occurred after suit was brought on the covenant.(a)

The court of common pleas, therefore, erred in excluding so much of the record in the case of *Hamilton* against the plaintiff as stated facts occurring after the commencement of this suit. This conclusion is attained however, without any labored comparison of the title of *Hamilton* with the statutes of Illinois, under which his title was consummated. The attention of the court has not been called to any alleged defects in that title, and therefore its legal sufficiency is not passed upon in this case.

The judgment of the court of common pleas is reversed, and the cause remanded for further proceedings.

(a) *Chauvin v. Wagner*, 18 Mo. 531.

Riley v. Clamorgan & Rippey. 15 Mo.

RILEY, plaintiff in error, v. CLAMORGAN & RIPPEY, defendants in error.

15 Mo. 331.

1. *Dower—Computation.*—The yearly value of the widow's dower in real estate, when it is not susceptible of division, and when she is to take an annual sum in lieu of dower, under the 28th and 29th sections of the act concerning dower (Revised Code, 435), (a) is its net annual product, without the expenditure of money or labor upon it, after deductions have been made from its gross income, of all the charges to which it is subject, such as taxes and repairs.

Error to St. Louis Circuit Court.

STATEMENT OF THE CASE.

Mary Riley sued Clamorgan & Rippey in dower. The premises are two lots in the city of St. Louis, one hundred feet front by one hundred and fifty feet deep, of which, however, the dowress' husband owned only an undivided two-thirds. The premises were improved and not susceptible of division. The dowress did not claim dower in the improvements, the premises being aliened by the husband in his lifetime.

There was no dispute as to the right of dower in the lands.

The only point presented for the decision of the supreme court is, as to the rule upon which the value of the dower shall be assessed.

CLOVER, for appellant.

SPALDING & SHEPLEY, *contra*.

GAMBLE, J., delivered the opinion of the court. [334]

In addition to the statement made by counsel it is necessary the case should show the fact, that no evidence was given as to any increase or diminution in the value of the property in which dower is claimed or in its yearly value, since the alienation by the plaintiff's husband.

The only question, then, presented is, what rule is to be adopted in computing "the yearly value of the widow's dower in the premises," when they are not susceptible of division, and when she is to take an annual sum in lieu of dower, under the 28th and 29th sections of the act concerning dower: Rev. Code, 435.

(a) Gen'l Stat. of 1865, chap. 130, §§ 31, 32. Wagner's Stat., p. 544.

It is contended, on behalf of the widow, that the proper rule is, to take the value of the whole premises in money, and allow her, annually for life, a sum equal to the interest on one-third of that value. In support of this position, reference is made to the opinion of Chancellor Kent, in the case of *Hale v. James*, 6 John. Ch. R. 258, and to the decision, *Beavis & Jamison v. Smith*, 11 Ala. Rep. 31.

We do not feel authorized to adopt any such rule of computation in this State. When the statute gives to the widow a sum of money, which is to be assessed as the yearly value of her dower, it authorizes no such assumption as that the yearly value will be equal to legal interest on the value of the fee simple. The investment of money in real estate, is here regarded as a judicious investment, because, in general, the appreciation of the property will exceed any ordinary rate of interest, and such investments are made in unimproved property, with no expectation that in addition to the appreciation of the property it will produce an annual income, equal to legal interest upon its value.

[* 335] *The yearly value of real estate is its net annual product, without the expenditure of money or labor upon it, after the deductions have been made from its gross income, of all the charges to which it is subject, such as taxes, repairs, &c.

The design of our law is to give to a widow the use for life of one-third of her husband's real estate, to be set off to her by metes and bounds, if practicable, without injury to the interests of those concerned. If from any cause she cannot have this third of the property, she takes, in lieu of it, an equivalent in money, which the law calls "yearly value of her dower." In such case, the owner of the fee continues in the enjoyment and use of the whole property, including her third. The question then is, how much is the yearly value of that third to him when the property is used, so as to make it productive. This will depend upon the locality of the property, its fitness for different uses, and all circumstances by which its productiveness may be increased or diminished. On the one hand no fanciful idea is to be indulged of modes in which, by extraordinary management, it might be made to produce a large income; nor, on the other, is the idea to be allowed a controlling

influence, that the owner may not choose to make it productive. It is a practical question, to be determined in relation to property held by one person, for the use of which he is to pay an annual sum for the whole life of another. It is a question that applies to the particular property in which the dower is claimed.

The uncertainty of the widow's life is not to be considered as a cause for reducing the amount; for that uncertainty attaches to the continuance of the annuity which is to be paid in lieu of dower. The sum to be annually paid, is the same, whether the widow be old or young, and whether the condition of her health gives promise of long life or not.

The first five instructions asked by the plaintiff were therefore rightfully refused, as they are all based upon the idea that her annual allowance is to be computed by the rate of interest upon a capital of money.

The sixth instruction, in which dower was claimed upon the value of the property as increased by other causes than the improvements made by the alienees of the husband was rightly refused, because there was no evidence given, as to any increase or diminution in the value of the property.

We now turn to the three instructions given by the court at the request of the defendants, and they show this remarkable fact, that three instructions, each of which covers the whole matter in dispute, and each differs in some measure from the others, in the basis upon which the computation of the widow's allowance should be made, are all at *the same time given to [* 336] the jury. It is not the question, in such case whether some one of the instructions may not be right, but is, whether either of them is wrong; for if either of them be wrong, it is impossible to ascertain that the calculation by the jury was not based upon it.

The evidence given on the part of the plaintiff was directed entirely to the value of the fee simple, as the claim was for interest upon one-third of such value. The evidence on the part of the defendant was confined to the question, how much rent the property would produce upon leases of different duration, from one to thirty years. The first of the three instructions given,

limited the plaintiff's right to one-third of what the property "would rent for leaving out all improvements, and deducting the reasonable and probable amount of taxes on the ground, free from improvements." The second, allowed the plaintiff one-third of the net annual value of the property, deducting taxes and not taking improvements into the account. The third allowed her one-third of the value of the use of the land, apart from improvements and deducting taxes.

Considering the state of the evidence before the jury, the first instruction was calculated to mislead them. They had before them estimates of the probable rent that the property would produce, when leased for different periods, and these estimates differed from ten cents to one dollar and fifty cents per front foot, according to the length of the lease. If they were at liberty to take either of the amounts, according to their own judgment, then the instructions applied no rule of law for their guidance, and the objection to the instructions is, that it left the whole question to the discretion of the jury, to take any one of the different amounts as the basis upon which they were to calculate the sum to be paid to the widow.

It is also objectionable, in leaving the deduction to be made on account of taxes, to probabilities, instead of being governed by the facts proved.

Either the second or the third instruction would by itself have been a proper direction to the jury, and there is no objection they were both given.

The judgment is reversed on account of the giving the first instruction and the case is remanded for further proceedings according to this opinion.(a)

(a) Reily v. Bates, 40 Mo. 468; Thomas v. Mallinckrodt, 43 Mo. 53.

ODELL & FRINK, plaintiffs in error, v. GRAY & Co., defendants in error.

15 Mo. 337.

1. *Contract*.—A contract made in another State to be executed here is to be interpreted by the laws of this State.
2. *Note—Bona fide holder*.—The holder of negotiable paper who puts his name upon it and places it in the hands of an agent for collection, cannot reclaim it, or the proceeds of it, from one who has *bona fide* paid value to such agent for it.
3. *Valuable Consideration*.—What constitutes where there are mutual dealings and mutual credits between the parties.

Error to St. Louis Court of Common Pleas.

HILL, for plaintiffs in error.

LORD, *contra*.

SCOTT, J., delivered the opinion of the court. [342]

In the argument of this cause, it was contended by the plaintiff's counsel, that the note, in which this controversy had its origin, was not negotiable, within the meaning of the statute relative to bills of exchange and negotiable promissory notes; and therefore, that the principles of law, asserted in the several instructions given by the court, were inapplicable. The term "negotiable," in its enlarged signification, applies to any written security which may be transferred by endorsement or delivery, so as to vest in the endorsee the legal title, so as to enable him to maintain a suit thereon, in his own name. In this sense of the term, a bond, under the statute concerning bonds and notes, may be said to be negotiable, and in this sense is the term understood when applied to paper in cases similar to that now under consideration. In this State, where there exists both bonds and promissory notes which are negotiable, but yet have none of the properties of a bill of exchange, but their being suable upon in the name of the endorsee and notes with all the characteristics of a bill of exchange, the term assignable is usually applied to the former, and negotiable to the latter class of those instruments.

The note, the proceeds of which are the subject of this suit, although made in New York, as it appears from its face, is payable here, and we will look to the laws of this State for the ascertaining of its nature and properties. Although it is not negotiable, in one sense of the term, yet it is in the sense which will enable a bona fide holder, for valuable consideration, to retain it or its proceeds against all claims of the payee. The holder of negotiable paper, who will put his name upon it and thereby give it currency, although he may place it in the hands of an agent, and without consideration, yet, cannot reclaim it from a holder who is [* 343] *found in possession of it or its proceeds, who has paid value for it. The maxim, that where one of two innocent persons must sustain a loss by the act of another, it shall fall upon him who put it into the power of the third person to do the act occasioning the loss, is applicable here. The rule that the bona fide holder of negotiable paper for value shall retain it or its proceeds against the payee, is generally admitted. In its application, however, a difficulty has arisen, as to what is a valuable consideration. If the holder has a pre-existent debt against the person from whom he receives it, it has been questioned, whether the mere application of the proceeds to the extinguishment of the debt or placing them to the credit of the person from whom it is received, will deprive the payee of his right to pursue the money in the hands of the holder. It is said that there must be an advance of money or giving of new credit on the faith of the paper, otherwise the holder has sustained no injury. In the case of *Clark v. Loker*, 11 Mo. Rep. 97, it was holden, that a creditor, to whom there was a transfer in good faith, of depreciated bank paper, in payment of a debt by an agent, to whom it had been entrusted, would hold the paper, unaffected by the claim of the principal. The case of the Bank of the Metropolis against the New England Bank, 6 Peters, 227, has carried the doctrine of the protection of bona fide holders of negotiable paper against the payee, as far as is warranted by authorities, and to an extent not sustained by the decisions of some courts. One of the instructions, asked by the plaintiff, was nearly in the language of the court in that case. The instructions given by the court, at the

instance of the defendants, was more liberal to the defendants than any case will warrant. Every presumption is in favor of the holders of negotiable paper bona fide and for a valuable consideration, and he who would reclaim its proceeds, must show the facts which would entitle him to the relief he seeks. It is said, that the payment of a pre-existing debt, or placing the proceeds of a note to the credit of him from whom it is received, leaves the holder in the same situation that he was in before he took the paper, in the event of his being compelled to restore the proceeds, and therefore he is not injured. In the case above referred to, of the Bank of the Metropolis v. The New England Bank, 1 Howard 238, it is maintained that the difference in principle is not perceived, between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case, as well as in the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties. If the parties appeared to be, and treated each other as the true owners of the paper mutually remitted, and had no *notice to the contrary, and [* 344] that balances were, from time to time, suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper, deposited or expected to be transmitted in the usual course of dealing between them, then the holder is entitled to retain for the amount due, on the settlement of the account. This authority does not go to the extent, that the mere placing the proceeds to the credit of the person from whom the paper was received and against whom there is a balance, will avail the holder as a defense. It must appear, that credit was given on the faith that such remittances would from time to time be made.

Judge Ryland concurring, the judgment will be reversed and the cause remanded.

BLOCK *et al.* respondents, v. CHASE, appellant.

15 Mo. 344.

1. *Witness*.—A mere formal party, standing indifferent to the real parties in interest, may be examined as a witness.^(a)
2. *Mortgage*.—The rights of one advancing money on the faith of property in the possession of another, who has the legal title, without any knowledge of the rights of others, will be protected.

Appeal from St. Louis Circuit Court.

WHITTLESEY, for appellants.

[* 345] *FIELD, *contra*.

SCOTT, J., delivered the opinion of the court.

This was a suit begun by a bill in chancery, filed by Block and others against Chase and others, to restrain the sale of a printing establishment, known as the office of the St. Louis Post [* 346] and Mystic Family, and *for relief. On a decree for Block and others, Chase and others brought the cause to this court, by appeal.

W. F. Chase held the property in trust for his brother, S. P. Chase. It was purchased with money procured by the endorsement of S. P. Chase, and which he afterwards paid. Wm. F. Chase sold one-half of it to J. D. Taylor, and took a mortgage on it to secure the payment of the purchase money. Taylor was put in possession of the establishment, and published a paper which was edited by Wm. F. Chase. At the time of his purchase, Taylor gave a declaration in writing, stating that he held one-half of the property in trust for S. P. Chase of Ohio. While things were in this posture, Taylor, to enable him to carry on his business, borrowed six hundred and twenty dollars from E. & E. Block, to secure the payment of which, he gave a deed of trust on the entire property, to Mandlebaum & Simons, trustees. This deed was duly recorded. It was charged in the bill and proved, that Wm. F. Chase knew of this deed, consented to it and received a part of

(a) Gen'l Stat. of 1865, chap. 144, § 1; Wagner's Stat. p. 1372.

the purchase money. E. & E. Block had no notice of the trust of S. P. Chase. Sometime afterwards, Taylor sold the property to Clark & Yost, and took their notes for the purchase money. A difficulty arising between them, in relation to this transaction, it was referred, and the arbitrators awarded, that the contract between Taylor and Clark & Yost should be rescinded, the notes delivered up, and the property placed in the hands of Ladew, one of the arbitrators, to be sold for the benefit of Sol. P. Chase, or to pay debts for which he was bound, as endorser for W. F. Chase. E. & E. Block were no parties to this arbitration. Ladew, being about to sell the property under the award, an injunction, the foundation of this suit, was applied for and obtained. It was objected, in the answer, that there was no equity in the bill. It was abundantly shown, that S. P. Chase had advanced the money with which the property was purchased by W. F. Chase, and that the latter was legally indebted to him. J. D. Taylor, having made no answer nor defense, was examined as a witness. He was objected to.

On a hearing, the court decreed that the property be sold, and that after paying what remained of the debt of E. & E. Block, which was reduced on account of usury, the balance should be applied to the benefit of Sol. P. Chase.

The objection, that Taylor was not a competent witness, cannot be sustained. He stood indifferent between the parties. Whoever prevailed, the property in controversy would be liable to satisfy debts for which he was bound. It was encumbered with debts, due by him both *to Block and to Chase. Under [* 347] the bill, as it stood, there could have been no relief against him. He was a mere formal party.

On the merits, the case is with complainants. J. D. Taylor was trustee of one-half of the property for S. P. Chase. He was in possession of the property and in law was the legal owner. Chase had a mere trust, recognized and enforced against *mala fide* purchasers and encumbrances. The instrument declaring his trust, was not recorded. It is not pretended that the Blocks had any notice of the trust. They are then protected by the statute regulating fraudulent conveyances. They advanced their money

on the faith of property in the possession of one who had the legal title, and without any knowledge of the rights of others. They are *bona fide* purchasers, for a valuable consideration, against whom equity will not relieve. As to the other half of the property, it seems that there was a mortgage on it to W. F. Chase. Taylor was in possession, and having purchased half of the establishment, he gave a mortgage to secure the payment of the purchase money. This deed was unrecorded, and under the statute concerning fraudulent conveyances, the deed of trust, for the benefit of the Blocks, must prevail over the unrecorded deed. That act prescribes, that no unrecorded deed of trust or mortgage of personal property shall be valid against purchasers or creditors, unless possession accompanies the deed.(a)

As to the question of jurisdiction, it may be remarked, that there was no demurrer to the bill. It was not allowable, to insist on the defense, that a party has an adequate remedy at law on the trial of the merits of the cause. By repeated decisions of this court, such an obligation can only be raised by a demurrer to the bill: 10 Mo. Rep., *Martin v. Green*, 652.(b)

The other Judges concurring, the decree will be affirmed.

(a) Gen'l Stat. of 1865, chap. 107, § 8; *Wagner's Stat.*, p. 281; *Bryson v. Penix*, 18 Mo. 13; *Johnson v. Jeffries*, 30 Mo. 423; *Miller v. Whitson*, 40 Mo. 97.

(b) *Oldham v. Trimble*, *ante*. p. 225.

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF MISSOURI.

JANUARY TERM, 1852.

THE STATE, defendant in error, *v.* FLOYD, plaintiff in error.

15 Mo. 349.

1. *New Trial—Discretionary Power.*—It must be very clearly seen that the discretionary power vested in the circuit court has been abused, before its judgment will be reversed on that account.
2. *Instructions.*—The judgment of the court below will not be reversed for a refusal to give instructions, provided it appears from the record that the law of the case has been laid down properly and fairly by the court, in the instructions which were given to the jury.^(a)
3. *Evidence.*—Possession of stolen property, after the theft, to raise a presumption of guilt, must be recent. *State v. Wolff, ante. 168.*

Error to Cole Circuit Court.

PARSONS, for plaintiff in error.

GARDENHIRE, Attorney General, *contra.*

RYLAND, J., delivered the opinion of the court. [354]

It will be seen from the above statement, that various points have been raised in the court below, many of which will be passed by without notice.

(a) *Pond v. Wyman, ante. p. 175, and notes thereto.*

The point in relation to the change of venue is not supported by the decision of this court in the case of *Reid v. The State*, 11 Mo. R. 379. In that case, it is obvious that Reid did not give previous notice, and that he gave it as soon as he could after he became satisfied of the existence of the cause for which he sought the change of venue.

It is the safer course for the party who wishes to [* 355] change the venue, to *give the reasonable previous notice to the attorney general or circuit attorney, before the calling of the case, and not depend upon the filing such notice merely in open court with the clerk. We do not say that this last method being done in time would not be sufficient, but the other is the surest and best.

As to the refusals of the court to continue this case on the affidavit made by the defendant below, and the refusal to permit an amendment to be made to the affidavit, there is no error. In matters which address themselves to the discretion of the court, we must see very clearly an abuse of this power before we will reverse. (a)

There is no error in the court's refusing to permit the defendant to give in evidence the warrant of the committing magistrate, or the indictment pending against Barker. This was clearly inadmissible. These minor points have been noticed in order that they may not again be brought here.

The instructions will now be noticed. This court will not reverse the judgment of the court below, for the refusal to give instructions, provided it appears from the record that the law of the case has been laid down properly and fairly by the court, in the instructions which it did give to the jury. Instructions are to enable the jury to understand the law of the case. A few short, pithy and sententious instructions, embodying the law of the case, will always be better understood, and will have more effect upon the triers of fact, than a long list of instructions, loaded with words, generally so involved that it tends to confuse rather than conduct the jury to a proper conclusion.

(a) *Owens v. Tinsley*, 21 Mo. 423; *Dozier v. Jerman*, 30 Mo. 216.

The second instruction, given by the court on the part of the State, which is as follows: "If goods to the value of ten dollars or more, described in the indictment, were stolen, and afterwards found in the possession of defendant, it is *prima facie* evidence of guilty possession, and if unexplained by him is conclusive evidence of his guilt," does not contain a proper exposition of the principle of law which, no doubt, the court designed to give. This proposition is too large, too unlimited. Had it been qualified by stating "recently" after the commission of the theft the goods were found in the possession of the defendant, such possession was *prima facie* evidence of guilt, it would have been proper. But here there is no limit as to time. This point was decided by this court in St. Louis at the last October term, in the case of *The State v. Wolff*, not yet published. (a) Greenleaf says: "But possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained, either by direct evidence or by the attending circumstances, or by the character and habits *of life of the [*356] possessor, or otherwise, it is taken as conclusive:" 1 Greenl. Ev. sec. 34.

A theft having been committed, and the goods being soon after found either on the prisoner's person or in his house, &c., he is *prima facie* deemed guilty. Here, however, we must attend to several things; and first, of the time: Lord Hale says, if the goods be found with the prisoner the day of the theft being committed, this is a strong presumption; and yet, even in such a case, C., a very subtle horse-thief, being pursued, procured B. to lead the horse under the pretence that he, C., was pressed to go aside; thus escaping and leaving the presumption to fall on B., who was condemned and executed, though tried before a very learned and wary judge: 2 Hale's P. C. 289.

In the case of *The State v. Adams*, Haywood's Rep. 1 vol. 464, the court said, where a horse is stolen and found in the possession of a man at such a distance from the place where the horse was missing, in so short a time after as shows he must have come

(a) *Ante*. p. 168; *State v. Creson*, 38 Mo. 372.

Nelson & O'Bryan v. Russell's Adm'r. 15 Mo.

directly from that place, and without any loss of time, that is such evidence as a jury may infer the guilt of the prisoner upon, as it raises a violent presumption against him that he was the taker. This principle is so generally understood that it is needless to cite authorities further. It must be recently, and this depends much on the nature of things stolen, both as to time and force of the presumption.

For this second instruction, therefore, the judgment of the court below must be reversed. This case is remanded to be further proceeded in according to the views of this court, the other Judges concurring.

NELSON & O'BRYAN, trustees of Nelson, plaintiffs in error, v.
JAMES RUSSELL's Administrators, defendants in error.

15 Mo. 356.

1. *Administration—Classification of demands.*—The classification of a demand against an estate, if erroneous, should be appealed from when made. The county court has no right to change it at a subsequent term.
2. *Classification—Entry.*—The statute does not require that a classification of a demand should be entered on the record at large. An indorsement of its class on the claim itself, and an entry on the abstract book, is all that is required, to give the allowance and classification validity.

[* 357] **Error to Cooper Circuit Court.*

ADAMS & MILLER, for plaintiff in error.

HAYDEN, *contra*.

SCOTT, J., delivered the opinion of the court.

Thomas W. Nelson was security on a bond executed by the intestate, J. W. Russell, for a thousand dollars payable to himself, Jordan O'Bryan and Wm. H. Trigg, trustees of Margaret Russell. J. W. Russell, having departed this life on the 19th of September, 1843, Wm. H. Trigg and Thos. Russell became his

administrators. Trigg was the active administrator and took upon himself the collection of the debts due the estate. On the 8th of August, 1845, Trigg, as one of the payees of the bond due by Nelson as security for J. W. Russell, presented the same to the court of probate for allowance. The demand was allowed and placed in the 6th class. The entry of the classification of the demand was made upon the minutes of the court, but not transferred to the record at large. There was a memorandum on the bond in the handwriting of the *presiding justice of the county court in these words, [* 359] "\$1291.66, judgment 6th class," and also an endorsement by the clerk in these words, "judgment rendered, August 8th, 1845 (6th class) \$1291.66 2-3, attest B. E. Ferry, clerk." An entry of the same kind was made in the abstract book of the clerk.

At the January term, 1848, of the probate court of Cooper county, Jordan O'Bryan and Thomas W. Nelson, the payees of the said bond, moved to change the classification of the demand that had been previously made, and to place it in the 5th class of claims against the estate of Jas. Russell. It appeared in evidence, on this motion, that Trigg, one of the payees of the bond and also the administrator of the obligor, Russell, had had the possession of the bond from the date of its execution, and also that he was the active administrator in paying and collecting the debts of the estate. It was admitted that there was no money in the hands of the administrators when the motion was made, all the funds of the estate having been exhausted in the satisfaction of demands in the 5th and 6th classes.

The probate court sustained the motion and placed the bond in the 5th class of demands against the estate. Upon an appeal, this order was reversed by the circuit court, upon which this writ of error was sued out.

We do not see on what grounds the application of the plaintiff in error can be based. Nelson, the surety who seeks this relief, being also one of the payees of the bond, might have had it exhibited within time to be entitled to a place in the 5th class. Disappointment in his reliance on Trigg, who united in himself

the character of payee of the bond and administrator of the obligor, can give him no pretense to affect the rights of others. For if the classification of this demand is changed, and thereby a deficiency of assets should occur to satisfy the demands of the 5th class, the court would force Trigg to commit a devastavit, for a creditor cannot be forced to refund: *Lowthian v. Hassel*, 4 Brown. Chan. Rep. 124.(a) That Trigg was the active administrator can make no difference. The classification, if erroneous, should have been appealed from when made. The omission of its entrance on the record at large, confers no right on the plaintiffs in error to come in at this time and claim a change. If it were necessary, in order to entitle a party to an appeal, that the classification should have been of record, an application might have been made to amend.

The doctrine of retainer, as it existed at common law in favor of executors and administrators, does not obtain here. The provision for exhibiting demands against an executor or [* 360] administrator, when he *himself is the claimant, abolishes the common law in relation to this subject.(b) Nelson, being one of the payees of the bond, might have exhibited it for allowance against the co-administrator of Trigg or an administrator appointed to defend.

The statute does not require that a classification of a demand should be entered on the record at large. An endorsement of its class on the claim itself and an entrance on the abstract book is all that is required.

The other Judges concurring, the judgment below will be affirmed.

(a) See *Miller v. Janney*, *ante*. p. 265.(b) Gen'l Stat. of 1865, chap. 123, § 24; *Wagner's Stat.*, p. 105.

Bell v. Hoagland. 15 Mo.

BELL, appellant, v. HOAGLAND, respondent.

15 Mo. 360.

1. *Res adjudicata*.—A question cannot become *res adjudicata*, unless it is tried upon its merits.
2. *Same—Effect*.—A matter *res adjudicata* is equally obligatory on both parties; if it does not bind both, it binds neither.

Appeal from Cooper Circuit Court.

STATEMENT OF THE CASE.

Bell brought an action against Hoagland on the following instrument of writing; "Received, Boonville, March 14th, 1845, of Wm. G. Bell, three hundred dollars to be invested in lumber.

(Signed)

GEO. T. HOAGLAND."

and alleged in his petition that the defendant, Hoagland, had not invested the money in lumber according to his undertaking, but had converted it to his own use and refused to return it on demand, although a reasonable time for its investment had elapsed.

The defendant set up as his answer and defense, that the plaintiff's supposed cause of action had already been passed upon and adjudicated in a former suit, the record of which was filed as an exhibit with his answer.

The facts in the case are about these: The defendant held two promissory notes which were executed to him by the plaintiff, one of which was for \$828.38-100, dated the 1st of January, 1844; and the other was for \$188.53-100, dated 1st November, 1844, both of which were due one day after date and bore interest at eight per cent. per annum. These notes, long after they became due, that is to say, in the year 1849, were assigned by the defendant to one Thomas Hughes, who instituted suit, by petition in debt against Bell, upon these notes in the circuit court of Cooper county, and in that suit Bell put in the statutory plea of the general issue, under which he had the right to make any set-off, or other defenses he might have. Hughes died, and the suit was revived in the name of the defendant, George T. Hoagland, as his administrator, and upon the trial of that case in the circuit court, the plaintiff in this suit, who was defendant there, set up as an offset the receipt or instrument of writing upon which this action is founded, and the same was passed upon in that suit by the court, sitting as a jury, and the plaintiff in the former suit recovered a judgment and the offset was not allowed, and Bell took that case to the supreme court, and the judgment of the circuit court was affirmed.

Upon the trial of the present action before the circuit court, with a view to raise the question of former recovery, the defendant admitted, so far as the trial of this case was concerned, that the money had not been

invested in lumber and that it had not been returned to plaintiff on request, and relied upon the former adjudication as a complete bar to the plaintiff's action.

HAYDEN, for appellant.

[* 363] *ADAMS, *contra*.

RYLAND, J., delivered the opinion of the court.

From the above statement it is clear, that the main question between the parties to this record, involves the fact of a former adjudication of the subject matter now in controversy. Has a court of competent authority ever passed upon the matter now in suit, in any former action between these parties or their privies, upon the merits of the demand?

In order to determine this question aright, it will be necessary to state a few of the leading facts as they appear on the record. Hoagland assigned to Hughes two bonds or notes on the plaintiff Bell. Hughes, as such assignee, brought suit on the notes against Bell, and on the trial Bell offered the receipt, set out in the above statement as the foundation of the present action, as a set-off against the notes in Hughes' action. The circuit court thought the receipt pertained to a partnership transaction between Hughes' assignor, Hoagland, and Bell, and as such partnership transaction, it could not be set off against the notes, and rejected the set-off for want of jurisdiction. There is no pretence that the merits of the set-off were ever passed upon—it was merely rejected, [* 364] and that too for want of jurisdiction. The justice and truth of this set-off have never yet been heard or examined into by the court.

There is error in the ruling of the court below, in supposing this action of the court in the case of Hughes' Administrator v. Bell, was such as concluded Bell, or such as concluded Hoagland in relation to the question of partnership between them. Suppose in a controversy between Bell and Hoagland, in order to establish this partnership, Bell had offered this record, showing the rejection of his set-off in the suit of Hughes' administrator against him by the court below, because that court considered it a partnership transaction between Bell and Hoagland, can it be maintained that

Hoagland would be bound by it; concluded by it? He would answer, it was a transaction in court, to which he was individually no party—to which he could not have made any defense; nor was he to be considered bound or concluded by it, and there is no doubt but he would answer correctly, both as to law and fact. Then if Hoagland would not be bound by the act of the court, saying there was a partnership between him and Bell, neither would Bell be. So far then as the matter of partnership is concerned, there is no pretence that it has been ripened into the force of an adjudication between these parties.

When a matter becomes what is termed *res adjudicata*, it is equally obligatory on both parties; if it is not binding on both, it binds neither. In this transaction, the rejection of the set-off because the court, on the trial of Hughes' suit, decided that the set-off could not be used, it being part of a partnership transaction between Bell and Hoagland, cannot be considered *res adjudicata* in Bell's favor against Hoagland if he wished so to use it, because he has not the force of *res adjudicata* against Hoagland, he being no party to the record in his own right.

The reason why courts of justice will not disturb matters once tried between the same parties is, that it is for the interest of the commonwealth that there should be an end to litigation. It would be carrying the doctrine a great ways indeed, for the courts to say that the bare rejection of a subject matter of set-off, in a suit between assignee and payee of a note or bond, for the want of jurisdiction in the court over the subject of set-off, should afterwards be considered *res adjudicata* between the payee and assignor, for any purpose either of jurisdiction or merits.

The court below erred in refusing to give the instructions asked for by the plaintiff, and in giving the one it did for the defendant.

Its judgment is reversed, the other Judges concurring and this cause is remanded to be further proceeded with in accordance with the views of this court. (a)

(a) State v. Morton, 18 Mo. 69.

Johnson v. McGruder. 15 Mo.

JOHNSON, appellant, v. McGRUDER, respondent.

15 Mo. 365.

1. *Agent—Title Bond.*—Although a title bond be executed by an agent in such manner as to prevent its operating at law, as the agreement of the principal, yet, in equity, it would be regarded as a sufficient note or memorandum to defeat a bar to its specific performance, founded on the statute of frauds, it appearing that the agent was authorized and intended to bind his principal. 10 Mo. Rep. 264.(a)
2. *Specific Performance—Statute of Frauds.*—The payment of the purchase money, the delivery of possession, and the making of valuable improvements, will avoid the plea of the statute of frauds, and entitle the grantee to the specific performance of a contract for the conveyance of real estate.
3. *Agent—Implied Powers.*—In general, an authority to sell and convey lands for cash, confers on the attorney the right to receive the purchase money.
4. *Agent—Verbal authority—Statute of Frauds.*—A verbal authority to an agent to make a contract relative to the sale of lands, is valid, and not within the statute of frauds.
5. *Equity—Practice.*—An answer in chancery, although directly responsive to a fact stated in the bill, and denying its truth, may be overthrown by the evidence of one witness, and corroborative evidence.

Appeal from Moniteau Circuit Court.

EDWARDS, for appellant.

[* 366] *HAYDEN, *contra*.

SCOTT, J., delivered the opinion of the court.

This is a bill in chancery, filed by the appellant, as trustee for the wife and children of W. J. Kelly, against the appellee for relief. It is substantially alleged, that about the 1st of February, 1846 (it should be 1838), the appellant purchased from one W. S. Gamer, as agent for the appellee, several parcels of land, containing in the aggregate 160 acres for the sum of \$325. That at the time of the sale, the said Gamer, as agent, executed and delivered to the appellant a writing obligatory, reciting the contract afore-

(a) Gen'l Stat. of 1865, chap. 106, § 5; Wagner's Stat., p. 656.

said, and thereby bound himself as agent for the appellee to convey to the appellant, or cause to be made unto him a deed for the premises sold whenever thereunto requested. That by the said writing obligatory it was stipulated that W. J. Kelly, above named, the husband and father of the *cestui que trusts*, above mentioned, would pay within twelve days from the execution of the said writing the sum of \$260, which was accordingly done. That Gamer, the agent, immediately put the *cestui que trusts* in possession of the lands sold, who have continued thereon until the [* 367] present time. That the same appellee, McGruder, publicly represented that the said Gamer was his agent and was authorized to dispose of the premises in controversy. That about the 20th of April succeeding the sale, the said appellee wrote a letter to his said agent, approving the disposition that had been made of the land, and afterwards received a part of the purchase money. That in November, 1842, he obtained a judgment at law against the said W. J. Kelly, the tenant in possession of the premises in dispute. That the agent, Gamer, has since departed this life, and P. Wilson and Adelia Gamer, wife of the said agent, have taken upon themselves the burden of administration on his estate. A prayer is then made for a specific performance of the contract above set forth.

A demurrer to the bill was overruled, and thereupon the appellee filed his answer thereto, in which it is substantially alleged that the appellant purchased of W. S. Gamer the land mentioned in the bill for the consideration therein expressed, that Gamer executed the writing and paid the money as is charged in the bill. That he was in the year 1837, and is now the owner of the land in controversy, and being a resident of Kentucky, and about to return thither, he requested Gamer to prevent trespasses on his land who consented to so, and then enquired of the appellee if he would sell it, to which he replied that he would take for it the sum of \$300, in cash, and that he, Gamer, or his brother Thos. McGruder, of Howard county, might negotiate the sale, with the understanding that the purchase money should be paid to his said brother. That Gamer might refer any person wishing to purchase to his brother, or he might sell himself, sending the purchaser to

his brother to receive the purchase money. That the foregoing is the only conversation he ever had with Gamer, touching the sale of his land, and furnishes the only authority with which he was clothed to act in his behalf in regard thereto. That he never represented that the said Gamer was his agent, otherwise than as above stated. That he returned to Kentucky in the fall of 1837, and was not in Missouri again until 1840, and never saw Gamer after the above recited conversation in 1837. That in the spring of the year, 1838, he received a letter, purporting to be written by Gamer, which stated that he had negotiated a sale of the land to W. J. Kelly for the sum of \$325, and that the money was ready to be paid to his brother Thomas, so soon as a deed should be sent out. This letter is now lost or mislaid. That sometime in the month of April, 1838, he wrote a reply to Gamer (the only letter he ever wrote to him) in which he expressed his satisfaction with what Gamer represented he had done, and at the same time [* 368] informed his brother, by letter, what *had been done and enclosed to him a deed which was to be delivered on the payment of the purchase money. That in the fall of 1838 his brother was on a visit to Kentucky, and whilst there, handed to him the sum of \$25, saying it was paid to him by Pleasant Wilson as a part of the purchase money of the land. That the said sum is all that he has received, and that he would not have taken it unless he had believed that the balance would have been paid in a short time.

The possession of the land by Wm. J. Kelly and his family, from the year 1838, is admitted by the appellee, though he professes to be ignorant of the person by whom it was given.

An amended answer insists on the statute of frauds and perjuries as a bar to the relief sought by the bill.

On replication being filed the cause was set for hearing.

On the trial, a witness testified that in 1837 or 8, he heard the appellee authorize Gamer to sell the land for the sum of \$300, and to loan out the money, which Gamer consented to do. That the land was sold accordingly, and Kelly's family put in immediate possession thereof and has remained upon it ever since.

The execution of the title bond given by Gamer having been

proved, it was read in evidence. The bond was executed by Gamer in his own name, although, from its contents, it appeared that he was acting as agent for the appellee. It recited that Gamer had sold the land to Johnson for the sum of \$325, the receipt of which was acknowledged, and bound him as agent for the appellee to convey the land or cause it to be conveyed with a deed of warranty. A condition was endorsed on the bond that it should be void unless the sum of \$260, should be paid in twelve days. A receipt for that sum was endorsed, dated 5th of February, 1838. The bond was dated the 2d of February, 1838.

The portion of the letter from the appellee to Gamer, in relation to the sale of the land was read, which is in these words. "This the 19th of April, 1838. Mr. Walter Gamer, I received your letter about the 1st of April and you wrote to me that you had sold my land and you want me to send a deed to the land, which I will do in the course of 3 or 4 weeks. I am very well satisfied with the sale. I will send a deed to my brother Thomas and want him to receive my money. My reason for his receiving it, I want him to pay to brother Owen \$100, which my father will repay to me again, &c."

Pleasant Wilson, one of the administrators of Walter Gamer, testified that he found among his papers two notes which were given for the money loaned out for the appellee, which he declined taking unless they were endorsed, which he refused to do.

It was proved that the yearly value of the land was [369] \$40. That Kelly's family had built a good hewed log house upon it; had put up out-buildings, cleared some land and erected fences.

The court below decreed that the appellee refund to the appellant the sum of \$25.00, and denied a specific performance of the contract as prayed for, from which decree this appeal was taken.

As to the title bond set out in the bill, although it was executed in such manner as to prevent its operating at law as the agreement of McGruder, yet, in equity it would be regarded as a sufficient note or memorandum to defeat a bar to its specific performance founded on the statute of frauds, it appearing that the agent was

authorized and intended to bind his principal. 10 Mo. Rep. 264; 11 Ohio, 223.

But without resorting to the contract in writing set up in the complainant's bill as one of the grounds on which a specific performance of the contract should be decreed, we are of the opinion that the facts in evidence, establishing the payment of the purchase money, the delivery of possession and the making of valuable improvements, will entitle the complainant to the relief sought by his bill. (a) The answer asserts, that the sole authority of the agent was to negotiate the contract of sale, and maintains that by the direction of the defendant, the purchase money was to be paid to his brother in Howard county. In relation to this fact, the answer is in direct conflict with the evidence of the witness examined in the cause, who testified that the agent was authorized to sell the land and loan out the purchase money. As the money could not have been loaned out without first receiving it, an authority to loan implied an assent to its receipt.

In general, an authority to sell and convey lands for cash, confers on the attorney the right to receive the purchase money. *Peck v. Herriott*, 6 Ser. & Rawl. 149. So it has been held that an authority to make contracts for the sale of lands, will authorize the agent to receive so much of the purchase money as is to be paid in hand on the sale, as an incident to the power to sell. *Yerby v. Grisby*, 9 Leigh. But it has been maintained that an agent employed to contract for the sale of an estate, has no authority as such to receive payment of the purchase money, though an auctioneer may receive the deposits paid down as earnest.

This case will not involve the implied powers of an agent, employed to make a contract for the sale of land, as there is evidence of an express authority which clearly implied the power to receive the purchase money. The delegation of the authority to the agent to make the contract, was by parol, and its

(a) *Park v. Leewright*, 20 Mo. 85; *Despain v. Carter*, 21 Mo. 331; *White v. Watlins*, 23 Mo. 428; *Charpiot v. Sigerson*, 25 Mo. 63; *Dickerson v. Chrisman*, 28 Mo. 140; *Young v. Montgomery*, *id.* 604; *Price v. Hart*, 29 Mo. 171.

existence is sustained by the evidence of a *single witness. [* 370] But it will not be questioned, that a verbal authority to an agent to make a contract relative to the sale of lands is valid and not within the statute of frauds, (a) and that an answer, although directly responsive to a fact stated in the bill and denying its truth, can be overthrown by the evidence of one witness and corroborative evidence. There is no doubt, from the pleadings in the cause, that there was power in the agent to negotiate the sale. The only difficulty arises with respect to his authority to receive the purchase money, as an authority to receive it entire would incidentally confer the right to deliver the possession to the vendee. The positive evidence of the witness establishing the agency is sufficient to overturn the answer of the defendant, it being fortified by the facts of the receipt of \$25.00 of the purchase money from his brother a considerable time after the sale without objection, and when we must presume he was acquainted with everything that had been done, as he received the money from that brother to whom the whole of it, according to his showing, should have been paid; and his willingness to receive the notes for the purchase money which had been loaned out, if endorsed by the administrator of Gamer. The letter of the defendant in answer to that written by the agent, although the communication which prompted it does not appear, is not in conflict with this view of the subject. That letter fully ratifies what had been done by the agent. As the contract was made on the 2d of February, 1838, and as the purchase money was to be paid within twelve days thereafter, the desire expressed in the letter of the defendant of the 19th of April, 1838, that his brother should receive the purchase money, does not disprove the assumption that the agent was authorized to loan it out. Such a request does not negative the fact that a previous direction had been given to loan out the money. The money might have been put out by the agent prior to the receipt of the letter of the defendant as he was authorized to do, and as a considerable length of time elapsed from the payment of the purchase money until the receipt of the defendant's letter.

(a) *Riley v. Minor*, 29 Mo. 439.

On the ground on which this case is put it will steer clear of the statute of frauds. This court has repeatedly held that payment of the purchase money, delivery of possession and making valuable improvements will avoid the plea of the statute of frauds. Otherwise an enactment made to restrain fraud would become an engine to facilitate its perpetration, as nothing could be more fraudulent than to entice a person, under a verbal contract of sale, to enter on the land promised to be sold; to pay the purchase money and make valuable improvements, [* 371] *and afterwards to refuse a conveyance and turn him out of possession under the plea that the contract was not in writing.

The defendant, in his answer, admitted the letter read in evidence to have been written by him.

This may be a hard case on both parties, but there is nothing in the transaction which casts the least suspicion on the good faith of the complainant and those on whose behalf he was acting. There is no circumstance which excites the least mistrust of any collusion between them and the agent. A full price has been paid for the land, valuable improvements have been made thereon, and now to deprive the wife and children of Kelly of their money and labor for the benefit of one who employed the agent by whose conduct this controversy has been engendered, would be exceedingly oppressive. As one or the other of the parties must suffer, we are of the opinion that the circumstances warrant us in leaving the loss on his shoulders who first introduced the agent into this transaction.

The decree of the circuit court is therefore reversed, and this court proceeding to give such decree as should have been given below, doth order, adjudge and decree, that the title to the southwest quarter of the southeast quarter, the east half of the southwest quarter, and the northwest quarter of the southwest quarter, of section twenty-five of township forty-five of range fifteen, west of the fifth principal meridian, all in Moniteau county, in the State of Missouri, do vest in the complainant and appellant, David W. Johnson, and his heirs and assigns forever, in trust for the

wife and children of William J. Kelly, and that the said complainant recover his costs and charges in this behalf expended.

Judge Ryland concurring; Judge Gamble absent.

SMITH'S Ex'r, plaintiff in error, v. BENTON, defendant in error.

15 Mo. 371.

1. *Practice*.—At the bottom of an answer signed by a defendant, a magistrate of the District of Columbia appends his statement, that the defendant personally appeared before him, and made oath that the facts stated in the answer were true; it is a substantial compliance with the act regulating practice in courts of justice.
2. *Bonds—Presumption of Payment*.—The common law presumption of payment, after the lapse of twenty years, applies to bonds executed prior to the year 1835. (Rev. Stat. of 1845, 721, § 2; 10 Mo. 97.)

Error to Cooper Circuit Court.

HAYDEN, for plaintiff in error.

ADAMS & LEONARD, *contra*.

GAMBLE, J., delivered the opinion of the court, [273]

The plaintiff in error sued Benton on a bond dated June 10th, 1821, by which Benton promised to pay to Thomas A. Smith, plaintiff's testator, \$2,000 one day after date. On this bond there was a credit for \$750, paid July 5th, 1821.

The defendant answered, stating that the bond was given for the purpose of enabling the obligee to raise immediately the sum of \$2,000, in part payment of sums then due him on pre-existing contracts, and that soon after and long before the death of the said obligee (Thos. A. Smith) all such contracts were settled and paid and the said bond as part and parcel thereof. The answer, after stating circumstances, intended to show that the bond had been paid, concludes by insisting upon the lapse of time and the statute of limitations as bars to the recovery.

The answer, was signed by the defendant; and at the bottom, a

magistrate of the District of Columbia, appends his statement that the defendant personally appeared before him and made oath that the facts stated in the answer were true.

Before the trial, the plaintiff moved to strike out the answer because it was not verified by the defendant's affidavit, but the court overruled the motion.

On the trial of the cause, the plaintiff gave in evidence to the jury the bond with the credit endorsed thereon dated July 5th, 1821. There was no other evidence before the jury. The court instructed the jury, at the request of the plaintiff: 1st. That they should find for the plaintiff unless they find from the evidence that the defendant, Benton, has paid the debt sued for. 2d. That it devolves, upon the defendant to prove the demand sued [* 374] for was paid, before they can find that the same *was paid by the defendant. 3d. That the jury will disregard as evidence of payment, the facts and statements made by the defendant in his answer, in regard to the payment of the demand sued for.

The plaintiff asked an instruction which the court refused. It is in these words: "Although the jury, may find from the evidence, that twenty years had elapsed after the bond became due, before the commencement of this suit, yet if the jury find from the facts and circumstances of the case, that the debt sued for has not been paid, then the jury ought to find for the plaintiff."

At the request of the defendant, the court gave the following instructions:

1. If the jury find that twenty years elapsed after the bond became due, and after the date of the credit endorsed on the bond, and before the commencement of this suit, then the presumption is that the debt has been paid, and in the absence of proof to repel this presumption, the jury must so find.

2. In this case, no evidence has been given to rebut the presumption of payment.

A verdict and judgment having been given for the defendant, the plaintiff brings the case before this court by writ of error.

The first matter of complaint is, the refusal of the circuit court to strike from the files the answer of the defendant for want of a

sufficient affidavit. The objection is that the defendant, although he signed the answer just above the magistrate's certificate, of his having been sworn to the truth of the facts stated in the answer, did not sign the certificate of the magistrate as an affidavit separate from the answer.

If the certificate is regarded as an ordinary jurat, then the whole answer is an affidavit. But this point may be dismissed with the remark that the practice act is substantially complied with.

As all the instructions asked by the plaintiff were given, except the fourth, and as it stands in immediate connection with the questions involved in those given for the defendant, they may be considered together.

The law as declared by the circuit court is, that after the lapse of twenty years, a bond is presumed to be paid, and that this presumption, like any *prima facie* evidence of a fact stands good unless it be rebutted by evidence to be given by the party setting up the bond, satisfying the jury that in fact the payment was not made. (a)

The plaintiff insists that the presumption of payment, as known to the common law, does not apply to bonds executed prior to the year 1835: Revised Code of 1845, 721, sec. 2. It might be necessary to discuss this question here if it were not settled in the case of *Clemens v. *Wilkinson*, 10 Mo. [* 375] R. 97. That was a case in which the presumption of payment was applied to a judgment rendered prior to the year 1835, and in which the argument was made that the first section of the fourth article of the act of limitation superseded the common law presumption and gave a commencement to the presumption created by statute from the 1st of December, 1835. The two sections of the statute, the first applicable to judgments and the second to specialties, are identical in their provisions and must have the same construction. The decision, then, in *Clemens v. Wilkinson*, is conclusive upon this question. It was there held

(a) The Statute of Limitations now applies to sealed instruments; see Gen'l Stat. of 1865, chap. 191, § 9; Wagner's Stat. p. 917.

The State v. Price and Lusk. 15 Mo.

that the common law presumption was not affected by the statute, but that a judgment rendered prior to 1835, should be presumed to be paid after the lapse of twenty years from its rendition. The instructions given in this case for the defendant were in accordance with this decision. The fourth instruction asked by plaintiff was properly refused; for although a jury ought not to find that a bond has been paid, when they are convinced "from the facts and circumstances" that it has not been paid, yet these "facts and circumstances" must appear in the evidence, and here there was no evidence before the jury, on either side, but the bond and the credit endorsed.

The judgment, then, is, with the concurrence of the other Judges, affirmed.

THE STATE, to the use of Renfro's Adm'rs, plaintiff in error, v.
PRICE and LUSK, defendants in error.

15 Mo. 375.

1. *Practice—Imperfect Counts.*—A motion to strike out imperfect counts from a declaration, must be made before the jury is sworn or the trial submitted to the court, and upon reasonable notice to the adverse party. (Rev. Stat. 1845, p. 819.)
2. *Administration—Bond.*—The grant of letters of administration and the execution of the bond, are, under our law, parts of one and the same transaction, and the different acts may be brought together to show what was intended. If the given name of the deceased is left out of the bond, but inserted in the letters, there is a sufficient description by which the estate meant by the parties can be ascertained; and the letters, the bond referring to them, may be produced to explain the ambiguity.

Error to Cole Circuit Court.

EDWARDS & PARSONS, for plaintiff in error.

[* 376] HAYDEN, *contra*.

GAMBLE, J., delivered the opinion of the court.

This was an action on the bond of Martin, administrator of Jesse Renfro, against Price and Lusk as his securities. The declaration states the making of the bond, and sets out the condition, in which it is recited "that Martin had that day been appointed administrator of the estate of — Renfro, deceased," and then the condition is, "that if Martin shall faithfully administer said estate, &c., the bond shall be void." The declaration contains the averment that the bond was given to secure the faithful administration, by Martin, of the estate of Jesse Renfro, deceased. There were four breaches of the condition stated in the mal-administration of the estate of Jesse Renfro. The defendant pleaded *the general issue, allowed by the act of 1847 [* 377] to be pleaded to all actions. A jury was sworn, and before any evidence was given, the defendant moved the court to strike out all the breaches in the declaration. The court sustained the motion and the plaintiff took a nonsuit, and after moving to set it aside, excepted to the decision of the court.

The circuit court could only have allowed the motion to be made before the jury was sworn, from a want of recollection of the statute. The 21st section of the 4th article of the act regulating practice: Revised Code, 819, allows a motion to be made to strike out imperfect counts from a declaration, but this motion is to be made "before the jury is sworn or the trial submitted to the court, and upon reasonable notice to the adverse party." (a) The motion in the present case, was made upon the assumption, that the breaches of the condition of a peñal bond, as stated in the declaration, were to be treated as distinct counts in a declaration. If this position be admitted, still the court erred in allowing the motion to be made after the jury was sworn.

But upon the question of law arising upon the motion, if it had been made in time, the court also erred. That question as now argued upon the writ of error, is whether it was competent for the plaintiff to aver that the bond sued upon was for the faithful administration of the estate of Jesse Renfro, and to claim against the securities the damages sustained by the mal-administration of

(a) See Gen'l Stat. of 1865, chap. 168, § 11; Wagner's Stat. p. 1035.

his estate. The securities have, in their bond, recited the fact that Martin was on that day appointed the administrator of the estate of — Renfro. They have therefore referred to the letters of administration granted to Martin, which our law compels the clerk to record before they are delivered. The declaration alleges that Martin was appointed the administrator of Jesse Renfro, and that the bond was given for the purpose of securing the faithful administration of the estate of Jesse Renfro. This averment would be sustained (if any evidence be admissible to sustain it) by producing the letters of administration that day granted to Martin upon the estate of Jesse Renfro. The only question then, is, whether any evidence is admissible to show the person, intended by the parties, when using the words employed in this contract.

The securities have contracted that Martin, their principal, shall faithfully administer the estate of a deceased person. They describe the estate as that of Renfro, of which Martin was that day appointed administrator. Although the christian name of the deceased is not used in the bond, yet there is a sufficient description by which the estate meant by the parties can be ascertained. It is not necessary in this case, to involve ourselves in the maze of decisions that have been made [*378] *in respect to ambiguities patent and latent. If we look to the language used by the parties, in the bond itself, we can find a sufficient guide to their intention. Martin received the appointment of administrator of a person named Renfro ; (suppose by way of illustration Jesse Renfro) he was required to give a bond for the faithful administration of the estate, and while the letters of administration are filled up with the name of Jesse Renfro, the christian name is omitted in the bond ; and it is there stated that he was that day appointed administrator of the estate of — Renfro. If, in fact, the letters are upon the estate of Jesse Renfro, then there is sufficient reference to them in the bond, to authorize their production as the appointment mentioned in the bond, and as clearly showing what estate the securities obligate themselves shall be faithfully administered. The grant of the letters and the execution of the bond

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are, under our law, parts of one and the same transaction, and the different acts may be brought together to show what was intended. The bond then was not void, as must be implied in the decision of the circuit court, striking out all the breaches relating to the estate of Jesse Renfro. On the contrary, it is valid and effectually binds the securities for the administration of the estate of that Renfro upon whose estate Martin was on the day of its date appointed administrator.

After an examination of the numerous and varying, if not conflicting decisions upon the subject of ambiguities, it is thought best to put this case upon its own grounds, and not allow its own distinctive features to be lost in the confusion of the crowd of cases in which courts have examined the question of ambiguity.

The judgment of the circuit court is reversed and the cause remanded.

CASON, respondent, v. MURRAY, appellant.

15 Mo. 378.

1. *Frauds—Insolvent—Preference.*—A debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others; and such disposition of his effects, is not impeachable on the ground of fraud, even though it embraces all his property.
2. *Fraudulent Conveyance.*—A deed, although made for a valuable and adequate consideration, may still be void as to the creditors of the grantor, because of the intent with which it was made.
3. *Same—Intent.*—The intent, which under the law avoids a deed as to creditors, is an intent to "hinder, delay or defraud" them. An intent to prevent a sacrifice of the debtor's property is not sufficient.

**Appeal from Callaway Circuit Court. [* 379]*

LEONARD & HARDIN, for appellant.

HAYDEN & SHELEY, *contra*.

GAMBLE, J., delivered the opinion of the court.

This is an action of ejectment commenced by the appellee,

Cason, to recover certain lands in Callaway county. Both parties claim title under one James McKamey, The plaintiff claimed under the judgments and executions against McKamey and a sheriff's sale of the property under the executions, at which sale the plaintiff, Cason, became the purchaser and received his deed. The judgments were recovered in October, 1847. The defendant, Murray, claimed under a deed made to him by McKamey in August, 1842. The whole question in the case, as tried before the circuit court, was whether this deed to Murray was made [*380] with intent to defraud McKamey's *creditors, and so was void as to Cason, the purchaser on execution. The plaintiff gave evidence showing the indebtedness of McKamey at the time of making the deed to Murray, to the individuals who recovered the judgments under which the property was sold, as well as to other persons. He farther gave evidence to impeach the good faith of the parties to the deed from McKamey to Murray. Defendant gave evidence showing that at the date of the deed from McKamey to him, McKamey was indebted to him, and that he had become responsible for other debts of McKamey as his security to a considerable amount, some or all of which he had subsequently paid.

The plaintiff asked the court to give several instructions, and the court gave eight at his request, to two of which the defendant excepted. Those excepted to are in these words: "That if the jury find from the evidence, that the conveyance from McKamey to Murray for the land was made by McKamey and accepted by Murray, with a view or intent to delay or to hinder the creditors of McKamey of their actions, or the collection of their debts, or with an intent to prevent a sacrifice of the property of McKamey by a sale thereof by his creditors under execution, that then the jury are bound to find such conveyance fraudulent and void; notwithstanding they may even find that the said Murray did pay a valuable consideration for the land."

"That even though, by law, the said McKamey had a right to prefer Murray as a creditor—if Murray shall be found to be a creditor—yet if the jury find that this preference was contrived by McKamey and Murray, in the making of said deed, for the

purpose or intent of preventing the other creditors of McKamey from sacrificing under execution the property of McKamey in the collection of their debts, or with an intent or design to delay or hinder said creditors, or any of them, from the collection of their debts of McKamey, that then said conveyance to Murray is unfair, unlawful, fraudulent and void, as against the creditors of McKamey."

The defendant asked the court to give instructions, and the court gave some and refused two, to which refusal the defendant excepted. The instructions refused are in these words :

"If Murray had a just demand against McKamey, and was bound as his security for the payment of debts to others, he had a right to buy McKamey's property in order to pay himself and to secure himself against his liability, and if one of his objects and one of the purposes of McKamey in so doing was to prevent his property from being sacrificed under execution, such object was a lawful one, and does not render the deed void ; provided the jury believe that the defendant, Murray, did *no [* 381] more than was necessary to protect himself from loss by virtue of said preference."

"If the jury believe that the object of the parties to the conveyance, in making the same, was to prevent a sacrifice of the property of McKamey, and that the preference of Murray as a creditor was only a means used to carry that object into effect, the deed is void ; but if the jury believe that the object of the conveyance was a fair and bona fide intention to prefer Murray as a creditor, and to secure him from loss, and nothing more was done than was necessary for this object ; the fact that the parties were also influenced by a desire to prevent a sacrifice of McKamey's property, does not render the deed void."

It is not necessary to quote books for the purpose of showing that a debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others, and that such disposition of his effects is not impeachable on the ground of fraud, because it embraces all his property. It may be assumed that this principle is so universally known as to render a reference to books unnecessary.

It may also be assumed, as a principle of law well understood, wherever a statute against fraudulent conveyances, like the English statutes of Elizabeth, exists, that a deed, although made for valuable and adequate consideration, may still be void as to creditors of the grantor, because of the intent with which it is made.(a)

If we examine the instructions, asked and given for the plaintiff, Cason, and excepted to, we will find this latter principle carried to an extent not warranted by any construction which our statute against fraudulent conveyances has ever received. The jury are told in the first instruction excepted to—being the seventh in the order in which the instructions were asked—that if they find that the conveyance from McKamey to Murray was made and accepted with the intent to delay or hinder the creditors of McKamey of their actions, or the collection of their debts, or, *with an intent to prevent a sacrifice* of the property of McKamey, by a sale thereof by his creditors under execution, then the jury are bound to find such conveyance fraudulent and void, notwithstanding Murray paid a valuable consideration for the land. It is to be observed, that the jury are told in this instruction, that there are two intents, either of which will render a deed, made upon a full consideration, fraudulent and void as to creditors; the first is, the intent to hinder or delay the creditors; the second is, an intent to prevent the sacrifice of the property by a sale under the execution of the creditors. Under the latter clause of this instruction, a deed should be void in a

case in which an honest debtor, in failing circumstances, [* 382] should sell his *property for full consideration paid in money, to a friend who wished to prevent his property from being sacrificed, although the debtor should immediately apply the money to the payment of his debts, and although it was the intent of both parties to the conveyance, that the creditors, instead of being hindered or delayed, should receive the full value of the property immediately. The mere statement of such case shows the error of the instruction. Creditors have a right to the satis-

(a) Johnson v. Sullivan, 23 Mo. 474; Potter v. Stevens, 40 Mo. 229; Byrne v. Becker, 42 Mo. 264.

faction of their debts out of the property of their debtor, and they have a right to challenge the fairness and legal validity of a conveyance made by their debtor, with intent to hinder or delay them in obtaining this satisfaction, where the grantee participates in such intent. But it is not admitted, that in addition to this right of a speedy satisfaction of their claims, they have a distinct right to *sacrifice the property of their debtor*. Yet the instruction recognizes this as a right of the creditor; for in placing before the mind of the jury the two intents, in the alternative, either of which is to avoid the deed, the jury are told that although there may not have been any intent to hinder or delay the creditors, yet if there was an intent to prevent the property from being sacrificed on the executions, the deed is fraudulent and void. A reference has been made, in support of this instruction, to the case of *Waid v. Trotter*, 3 Monroe R. 1. In that case the conveyance was held to have been made for the purpose of delaying and hindering creditors, and the expression upon its face, that it was made to prevent the creditors "from sacrificing the property," was held to show conclusively the unlawful intent which would avoid the deed. If that case had held, or if it can be understood as holding, that the intent to prevent a sacrifice of the debtor's property, distinct from the intent to hinder or delay creditors, which is forbidden by the statute, avoids a deed, then we have the misfortune to differ in opinion with the court that decided that case. The other instruction, given for the plaintiff and excepted to, is liable to the same objection just stated, and need not be farther considered.

In considering the instructions asked by the defendant and refused by the court, they appear to be framed with a view to qualify the instructions previously given at the request of the plaintiff. If the court had not previously asserted, in the instructions for the plaintiff, that an intent to prevent the sacrifice of McKamey's property was an unlawful intent that avoided the deed, these two instructions would not have been asked, or certainly would not have been asked in their present shape. The first of these two ought to have been given, after the court had given those asked by the plaintiff; and the latter clause of the second should also have been given as a qualification of

[* 383] the plaintiff's *instructions. But in a future trial of the case, the court will not instruct the jury upon the intent to prevent a sacrifice of McKamey's property, as a distinct intent affecting the validity of the deed, and therefore it is not necessary to remark further upon these instructions of the defendant's which were refused. The intent which, under the law, avoids a deed as to creditors, is an intent to "hinder, delay or defraud" the creditors, and that intent is to be ascertained from all the circumstances under which the deed was made. A deed may be avoided on account of such intent, even when there is an adequate consideration. Inadequacy of consideration may be a circumstance tending to show a fraudulent intent. (a) In fact, all the relations of the parties, in all their transactions connected with the conveyance, may tend to explain the design of the conveyance; the intent with which it was made. The range of inquiry in the investigation of such questions is exceedingly broad; yet the jury, with all the evidence before them, must be satisfied of the existence of the particular intent mentioned in the statute, before they can find against the deed.

The judgment of the circuit court is reversed, and the cause remanded.

YOUNT *et al.*, plaintiffs in error, v. YOUNT *et al.*, defendants in error.

15 Mo. 383.

Partition—Jurisdiction.—Under the statute regulating partition, the circuit court has no jurisdiction to make partition of real estate situated in another county, unless it is divided by a county line, or all the parties in interest are adults, and parties to the petition.

Error to Cole Circuit Court.

PARSONS, for plaintiff in error.

GAMBLE, J., delivered the opinion of the court.

(a) Robinson v. Robards, *post.* p. 459.

The plaintiffs in error filed a petition in the circuit court of Cole county, stating that John Yount, of Callaway county, had died seized *of certain real estate in Cole [* 384] county, and of other real estate situated in Boone and Callaway counties, and that he had left a widow and several children, and the son of a deceased child, who were the heirs of the said John Yount. The petition alleges that other persons, who are named therein, have some interest in a portion of the property, as tenants in common with the heirs of Yount, but the petitioners are unable to state their interests. The grandson, who is stated to be a minor, and the persons named in the petition as owning interests in common with the heirs, are made defendants. It is alleged that the estate of the deceased John Yount has been settled, and that there are sufficient assets to satisfy all debts without resorting to the lands. Partition is prayed of the real estate situated in the counties of Cole, Boone and Callaway.

A guardian ad litem was appointed for the minor defendant, who filed his answer, and proceedings were had to bring in the other defendants.

On the trial of the cause before the court, the question arose, whether in this proceeding under the statute regulating partition, the circuit court of Cole county had jurisdiction to make partition of real estate situated in any other county. The court decided that it possessed no such jurisdiction, and proceeded to make partition only of the land in Cole county. The plaintiffs excepted to this decision, and bring the case to this court to have this question of jurisdiction decided.

The proceeding is strictly a proceeding under the statute, and has none of the features of a suit in chancery, and therefore we look only to the statute regulating partition to determine the jurisdiction of the circuit court. The first section directs that the petition shall be filed "in the circuit court of the county wherein such lands lie, or where any tract of land is divided by a county line, then in the court of either of the counties in which the lands may lie." The only case in which the court of one county can make partition, under this section, of land lying in another, is the

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single case of a tract divided by a county line, which is not this case.

The plaintiffs' counsel refers to the 56th and 57th sections as giving the jurisdiction he desires to have exercised. But in this he is mistaken. Those sections contemplate a case in which a person, owning real estate in several counties, dies leaving a widow and adult children, who all come before the court as petitioners and ask for the partition of the lands in different counties. The 57th section, in directing the proceedings to be had upon the petition, says, "the court, upon being satisfied that all the parties in interest are adults and parties to the petition, shall thereupon make an order, appointing three persons as commissioners."

[* 385] *In the present case, we have one of the parties in interest, a minor, made a defendant and not admitting the facts stated in the petition, while other persons, having unknown or unascertained interests, are made defendants. These sections, then, do not authorise any partition of the lands in Boone and Callaway counties under this petition.(a)

The judgment of the circuit court was right, and is, with the concurrence of the other Judges, affirmed.

DUNNICA, defendant in error, v. THOMAS' Adm'r, plaintiff in error.

15 Mo. 385.

Administration—Set-off.—A county or probate court has no jurisdiction to hear or decide upon a set-off, claimed by an administrator, against a demand exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the debtor.

Error to Cole Circuit Court.

[* 386] *EDWARDS, for plaintiff in error.

PARSONS & WHITE, *contra*.

GAMBLE, J., delivered the opinion of the court.

(a) But see Gen'l Stat. of 1865, chap. 152 § 2; Wagner's Stat, p. 966.

The question presented in this case is, whether a county or probate court has jurisdiction to hear and decide upon a set-off, claimed by an *administrator against the demand [* 387] exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the creditor.

It is most certain that such court has no jurisdiction to render a judgment in favor of the administrator for the excess of the set-off over the demand of the creditor; it can do no more than disallow the demand exhibited against the estate, and if the set-off is by that action extinguished, the excess is lost to the estate. The 10th section of the 4th article of the act concerning executors and administrators, Revised Code, 92, prescribes the course of proceeding, in a case when a person having a demand against an estate, admits a counter demand in favor of the estate exceeding his in amount.(a) In such case he is required to admit the amount of the debt which he owes the estate. But neither this, nor any other section of that act, contemplates a case in which a set-off may be claimed by the administrator, against a person holding a demand against the estate, the set-off exceeding the demand so held, and yet resisted or denied by the creditor of the estate.

As the creditors, and others interested in an estate, are entitled to have all the assets collected, it would be dangerous to their interests to allow an administrator to use as a set-off in the county court, a demand exceeding the claim asserted against the estate. The administrator has ready access to the other tribunals, and has ample time to prosecute the demand of the intestate against the debtor. There seems to be no necessity for allowing such set-off to be asserted in the county court, and it is evidently not within the meaning of any part of the administration law, that such controversies should be adjusted in those tribunals.

The decision of the circuit court, in rejecting the set-off, as a subject not within the cognizance of the county court, and consequently not within the jurisdiction of the circuit, when hearing an appeal from the county court, was correct, and the judgment is affirmed.

(a) Gen'l Stat. of 1865, chap. 123, § 13; Wagner's Stat., p. 103.

Smith v. Busby. 15 Mo.

SMITH, plaintiff in error, v. BUSBY, defendant in error.

15 Mo. 387.

1. *Title Bond*.—A bond to convey by a deed with general warranty, is not satisfied by the mere execution of a formal instrument, with covenants of title, but implies that the obligor will convey an indefeasible estate, and that his deed shall be operative for that purpose.
2. *Contract—Consideration*.—The inability of a party to do an act presently, which was to be performed in future, will not prevent his recovery of the consideration which had been promised to be paid for the act, before the arrival of the period for the performance of the thing stipulated to be done.
3. *Condition precedent*.—If a day be appointed for the payment of money, which may happen before the act which is the consideration for such payment is to be performed, an action may be brought for the money before performance of such act; such act is not a condition.

[* 388] **Error to Clinton Circuit Court.*

LOAN & VORIES, for plaintiff in error.

S. L. LEONARD, *contra*.

[* 389] SCOTT, J., delivered the opinion of the court.

This was a petition in debt in attachment, begun by Smith, assignee of John Townsend, against Milton Busby, on a note executed by Busby for \$337.50, payable 15th May, 1847, and dated March 20th, 1845. Plea, the general issue. On the trial, after proving the assignment, the plaintiff read the note in evidence, after which the defendant proved that the note sued on

was given as part purchase money for two tracts of
[* 390] *land of 160 acres each. At the time of giving the note, a certificate of pre-emption was passed to Busby for one quarter section, and a bond executed by Townsend, the assignor of the note in suit. The note sued on was of those mentioned in the bond, which was identified by the witness. The bond was then read in evidence, from which it appeared that Townsend bound himself in the penalty of \$1,800 to Busby, conditioned to make to Busby a warranty deed to the northeast quarter of section 33 in township 57, range 35, on the payment of

eight hundred and seventy-five dollars, in three notes bearing even date with the bond. The bond was dated May 20, 1845. The defendant then read a patent for the above tract of land, issued by the State of Missouri to S. L. Leonard, and proved by him that the said land had been selected by the State, under the authority of the United States; that he purchased Townsend's interest therein, who had a pre-emption thereto, and had proved up the same at sheriff's sale on an execution against Townsend, who was now insolvent.

The plaintiff then proved by an agent of Busby, that he rented the land to Townsend for \$100 and took his obligation therefor, which was delivered by Busby, who afterwards received the rent; that when Townsend sold the land to Busby and executed the above title bond, certificates of pre-emption had not been issued. Townsend and Busby went to the office to prove Townsend's right to pre-emption, but in consequence of some previous omission it was not then proved, but shortly after the certificate was issued, and it, together with the bond and the obligation for rent, was placed in the agent's hands, by whom they were delivered to Busby. The plaintiff then offered to prove that of the three notes, mentioned in the above bond, one was payable before that on which this suit was brought, and that the other was not due. This evidence was rejected. The plaintiff also offered in evidence the following agreement between Busby and Leonard, which was also rejected: "Whereas we, the undersigned, have severally claims to the northwest quarter section 34, township 57, range 35, and the northeast quarter section 33, township 57, range 35; and whereas the undersigned, Milton Busby, has actually paid out some nine hundred dollars for said northwest quarter of section 34; and whereas the undersigned, Solomon L. Leonard is satisfied that he has an indefeasible title to both said quarters, but in consideration that it would be hard for said Busby to entirely lose said \$900, and also to suppress strife and bickering and to promote kind feelings, and also in further consideration of two hundred and sixty-six dollars and thirty-three cents, the entrance money which said Leonard paid therefor, with interest to the present time, by said *Busby to said Leonard paid, said Leonard '['* 391]

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has made a deed of conveyance of said northwest quarter section 34 to said Busby, and said Busby declares that he has no just claim for said northeast quarter section 33, and that he will in no manner molest or harass said Leonard about said last mentioned quarter, but, on the contrary, he declares himself satisfied with the arrangement above set set forth.

Witness our hands and seals this twelfth day of November, in the year of our Lord, eighteen hundred and forty-seven.

SOLOMON L. LEONARD, [seal.]

MILTON BUSBY, [seal.]

From this state of facts, the question arises whether there was a failure of the consideration of the note sued on, or whether the plaintiff is entitled to recover. In the consideration of this question the evidence offered and rejected will be regarded as in the case and the facts it tended to prove will be taken as true.

In the court below, the plaintiff submitted to a non-suit in consequence of an instruction to the effect, that the land having been purchased by Leonard from the State, before the commencement of this suit, and he is still holding title to the same, and Townsend being unable to make a good title to the land, and insolvent, the consideration of the note sued on has failed.

It may be conceded that a covenant to convey by a deed with general warranty, is not satisfied by the mere execution of a formal instrument with covenants of title, but implies that the covenantor will convey an indefeasible estate, and that his deed shall be operative for that purpose. It may likewise be admitted, for it is statute law, that the maker of a note sued on may make the same defense against the assignee, that he might have made against the assignor or payee.

At common law, a failure of the consideration of a bond, whether partial or total, was no defense to an action on the instrument. A partial or a total failure of the consideration of a note might be used as a defense to an action upon it. Our statute has now abolished all distinctions between bonds and notes in this respect, and a failure of consideration, in whole or in part, may be given in evidence to defeat or diminish the recov-

ery in an action on those instruments : Code 1845, page 832.(a) Notwithstanding this provision, we are still left to general principles to ascertain what is a failure of consideration. Where a party has promised another to pay him money on a given day, in consideration of an act to be performed subsequently to that day, the insolvency of him who is to perform the subsequent act, is no bar to a recovery of the money promised in an action at law. How far such a consideration *would [* 392] influence courts of equity, it is not necessary now to determine. Nor would the inability of a party to do an act presently, which was to be performed in future, prevent his recovery of the consideration which had been promised to be paid for the act, before the arrival of the period for the performance of the thing stipulated to be done. Though a party may be unable to do an act to-day, it does not follow that he may not be able to do it six months hence. That lands have been sold to a third person which a party has promised to convey to another in future, does not necessarily preclude the idea that the party promising will not be able to perform his undertaking. It is a settled principle, that if a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, may happen, before the thing which is the consideration of the money, or other act is to be performed, an action may be brought for the money, for not doing such other act before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent: 1 San. 320. In 11 Wend. 48, *Johnson v. Wyzant*, it was held that on a contract for the sale of lands, by a vendor against a vendee, in which the consideration money is to be paid in installments and the conveyance to be made upon payment, if suit is delayed until all the installments are due, the covenants then become dependent. In this, however, the action was on a covenant, and the breach assigned was the non-payment of all the installments. So it appears the whole sum was due by a single instrument. A difficulty may arise in the application of the principle of the above case to those circumstanced as the

(a) Gen'l Stat. of 1865, chap. 172, § 24; Wagner's Stat., p. 1061.

one now under consideration, where separate securities are given and separate suits become necessary. If the securities should be assigned to different persons, in case of a partial failure of consideration, how would it be apportioned among the different holders; would the maker use the defense against which of them he pleased; would the last assignee be first resorted to; or would the contribution be in proportion to the respective amounts of the notes? But one assignee being before the court how would the date of the assignments be ascertained? 5 John. C. R. 235.

But this case steers clear of this difficulty as it appears that one of the notes was not due.

The defense to this action is an entire failure of consideration, but viewing the subject in the most liberal manner for the defendant, Busby, we do not see how it can be supported. He was put in possession of the land; he received rent for it. He had the very thing he contracted for. It is unjust to take possession of land, under a contract of sale, *retain it and yet refuse to pay the purchase money. The vendor should have his money or his land, and if the vendee intends to rescind the contract, he should relinquish his claim to the vendor and abandon the possession. The defense set up can only be maintained on the ground that Busby has a right to rescind the contract. Can he now do this? Has he not placed himself in a situation by which he is restrained from such a course? By his contract with Leonard, he has disposed of the very land, the price of which, in part, is the subject of this controversy. The caution with which he has worded his agreement will not avail him. In it he recites that he had a claim to this very land, and, although there is a subsequent disclaimer of title, and a total omission of all words of conveyance, yet the transaction would seem to amount to a release in effect. For a valuable consideration, he has precluded himself from an inquiry into the legality of the proceedings on the part of Leonard. It is impossible to read the agreement between Leonard and Busby, and say it was not an assumption of the power on the part of Busby to dispose of the land whose value is the subject of this suit. If Busby should now rescind his contract

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with Townsend, and put him upon Leonard, what consideration will Leonard have received for his conveyance of N. W. quarter section to Busby? If Busby intends to rely upon a rescission of the contract, he should have taken no step by which his right to do so could be compromised. (a)

The other Judges concurring, the judgment will be reversed and the cause remanded.

HEATH'S Administrator, defendants in error, v. ASHLEY'S Administrator *et al.* plaintiffs in error.

15 Mo. 393.

Equity—Infant.—A decree in a chancery cause against an infant, for want of answer, and without proof of the statements of the bill, is altogether erroneous.

Error to Benton Circuit Court.

HAYDEN & WRIGHT, for plaintiffs in error.

WINSTON, *contra*.

GAMBLE, J., delivered the opinion of the court. [395]

A decree in a chancery cause against an infant, for want of answer and without proof of the statements of the bill, is altogether erroneous. Chancellor Kent in *Mills v. Dennis* 3 John. C. R. 367, states the rule clearly and concisely.

The second point made in this case; that the decree is erroneous because no day was given to the infant, after he came of age, to appear and show cause against the decree; has the sanction of the same high authority, but I am not prepared to admit that that rule, though it prevails in the courts of chancery in England, is to be introduced into our practice. It is not necessary to the determination of this case, upon the present writ of error, that this question should be decided, and when it is to be passed upon, it will require a wider range of investigation, than the mere

(a) See *Wellman v. Dismukes*, 42 Mo. 101.

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examination of books, showing that it has been adopted and generally adhered to in the English courts of chancery.(a)

The decree is reversed and the cause remanded.

DAVIS & ALLEN, appellants, v. FOSTER, respondent.

15 Mo. 395.

Conveyance—Construction.—A conveyance containing a clause, transferring a negro woman to another, during her natural life, and reserving the increase of the negro woman for the heirs of a third person, to be divided among them by the grantor or his personal representatives, passes no present interest in the increase of the negro to such heirs, and they cannot have partition of them.

Appeal from Linn Circuit Court.

LEONARD, ABELL & STRINGFELLOW, for appellants.

[* 397] *ADAMS & HAYDEN, *contra*.

RYLAND, J., delivered the opinion of the court.

The construction of the conveyance by George S. Foster of the negro woman, Dice, to the defendant, Margaret Foster, is the principal matter in the present controversy. This conveyance contains the following clause, "to have and to hold the said negro woman, Dice, during her natural life." "The increase of the said negro woman is reserved for the heirs of said James S. Foster, and to be divided among the said heirs of James S. Foster by me or my personal representatives, so as to make an equal distribution, taking into consideration what I have given to said children." "And at her death (that is the defendant's death) the negro girl, Dice, is to be divided among said minors (naming them) equally."

The plaintiffs claim the increase of Dice under this conveyance.

Upon a careful examination of this conveyance, it becomes clear

(a) Hendricks v. McLean, 18 Mo. 32; Creath v. Smith, 20 Mo. 113; Shields v. Powers, 29 Mo. 315.

that there is no grant in it of any present estate in the increase of the negro woman, Dice, to the children of James S. Foster, the grandchildren of the grantor. Neither the terms of the conveyance, nor the intent of the grantor, as gathered from the whole instrument, can be construed into a grant of any present interest in and to the increase of the woman Dice, to the grandchildren of George S. Foster. "The increase of the woman is reserved for the heirs of James S. Foster, to be by me or my personal representatives distributed," &c. Here is no passing of any *present interest in the increase of Dice to the heirs of [* 398] James S. Foster. Nor can such terms be made into a grant. The obvious design of the grantor was to save the controlling power and the interest in the increase to himself, which he might hereafter distribute, or which his legal representatives might distribute.

To construe this instrument into a grant of a present estate in the increase of the negro woman Dice, to the heirs of James S. Foster, would produce the absurdity of supposing the grantor, George S. Foster, intended to give power to those minors to have a partition or sale of each child of the negro woman, Dice, as soon as it was born.

The deed of conveyance then, in the opinion of this court, passed no present estate in the increase of Dice to the children of James S. Foster. Neither the words of the instrument, nor the intent of the parties allow of the passing of any estate in such increase to the grandchildren of George S. Foster.

The court below declared the law to be, "That under the deed from George S. Foster to Margaret Foster, the plaintiffs cannot have a partition of the slaves, until the death of George S. Foster, or until he orders or authorizes a partition." This instruction is wrong in the latter clause of it. It should have stopped at the simple declaration, that the plaintiffs were not entitled to a partition in these slaves. But as the judgment of the court below, was, upon the whole case, for the right party, and as the qualification in the instruction was to the injury of the defendant, who notwithstanding had judgment, the judgment below is affirmed, the other Judges concurring.

Gullett v. Hoy & Orton. 15 Mo.

GULLETT, appellant, v. HOY & ORTON, respondents.

15 Mo. 399.

Note—Endorsement after Maturity—Equities.—The endorsee of a negotiable note, endorsed after it became due, takes it subject to all the equities attached to it in the hands of the payee. But the equities must be such as are connected with the note itself, and not such as grow out of distinct and independent transactions between the original parties. A set-off that might have been asserted against the payee, cannot be set up against the endorsee, although the note was transferred after it became due.

Appeal from Livingston Circuit Court.

HAYDEN, for appellant.

ABELL & STRINGFELLOW, *contra*.

GAMBLE, J., delivered the opinion of the court.

Gullett, as the endorsee of a negotiable promissory note, sued Hoy & Orton, the makers. The endorsement to Gullett was made by the payee after the maturity of the note. The defendants, in their answer, rely upon an offset due to them from the payee of the note before his endorsement of it to Gullett. The [* 400] plaintiff demurred to the answer *claiming the set-off, and the circuit court overruled the demurrer. As the offset claimed exceeded the amount of the note, judgment was rendered for the defendants.

The note in this case being negotiable, the statute which fixes the rights and liabilities of parties to bonds and ordinary notes when assigned, does not apply, but we must look to the general law applicable to bills of exchange, as by statute this note "has the same effect and is negotiable in like manner as an inland bill of exchange."

This note being endorsed after it became due, the endorsee took it subject to all the equities attached to it in the hands of the payee. These equities are such as are connected with the note itself, and not such as grow out of distinct and independent transactions between the original parties. A set-off that might

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have been asserted against the payee cannot be set up against the endorsee, although the note was transferred after it became due: Burroughs v. Moss, 10 Barn. & Cress., 558; 10 Mees & Wells, 696; 2 Penn. Sate R., 103; Story on Bills, § 220.

The demurrer to the set-off should have been sustained, and judgment should have been rendered for the plaintiff for the amount of the note and interest, as the set-off was the only defense made in the answer. The judgment is therefore, with the concurrence of the other Judges, reversed and the cause remanded that it may be proceeded with in accordance with this opinion.(a)

GOBIN, appellant, v. HUDGENS, respondent.

15 Mo. 400.

New Trial—Error.—The supreme court will not reverse a judgment, unless it appears that error was committed by the circuit court materially affecting the merits of the case.

Appeal from Livingston Circuit Court.

HAYDEN, for appellant.

ABELL & STRINGFELLOW, *contra*.

*GAMBLE, J., delivered the opinion of the court. [*402]

This was a civil action under the new code of practice to recover slaves. The trial was submitted to the court, and the court found a general verdict for the defendant, without finding the facts as required by the second section of the fifteenth article of the code. This section requires the decision of the court to be in writing, and that the facts shall be first stated, and then the conclusion of law upon the facts. The third section provides a mode for having a review in the circuit court of either a question of law or fact, and requires that, for that purpose, a case shall be made, containing so much of the evidence as may be material to the

(a) Wheeler v. Barrett, 20 Mo. 573; Unseld v. Stephenson, 83 Mo. 161; Mattoon v. McDaniel, 34 Mo. 138; Arnot v. Woodburn, 35 Mo. 99.

questions to be raised. When the court finds the facts, it is only by this proceeding, in making a case, that the evidence relating to the question of fact, or material to the question of law, is preserved.

Instructions were asked in the present case; but that practice is evidently inappropriate and useless, when it is the duty of the court to find the facts, and pronounce the law upon the facts found. If the facts found do not warrant the conclusion of law, the judgment is erroneous. But this conclusion of law, to be stated in the decision of the court, is distinct from the judgment, for the act directs that after the decision is made containing the facts and the conclusion of law, "judgment upon the decision shall be entered accordingly."

There is a great difficulty in determining the proper course to be adopted in a case like the present. Although there was a motion for a new trial, and a motion in arrest of judgment, there appears to have been no question made upon the failure of the court to make a decision *in conformity to the code. In fact, the whole proceeding has been conducted as if there had been no change whatever in the practice.

This court is directed by the seventeenth section of the nineteenth article, not to reverse a judgment unless it shall believe that error was committed by the circuit court against the appellant, materially affecting the merits of the case. (a) To reverse the judgment for the reason that the record does not contain the decision of the court upon the facts and law, would be to reverse it because the merits do not properly appear upon the record, and because a form was not adopted which neither the parties nor the court appear to have thought of.

Upon the whole, it is probably the safer rule to say that the judgment shall be presumed to be correct, until error is shown in the mode prescribed by law; and, therefore, the judgment is affirmed. (b)

(a) Gen'l Stat. of 1865, chap. 135, § 40; Wagner's Statute, p. 1068; Johnson v. Arendall, 34 Mo. 338; Valle v. Cerre, 36 Mo. 592.

(b) Bates v. Bower, 17 Mo. 550.

HOLLIDAY, defendant in error, v. LEWIS, plaintiff in error.

15 Mo. 403.

Replevin—Special Property—Possession.—A party who never has had the actual possession of personal property, and who is not the general owner cannot maintain replevin, against a party in actual possession. A person having only a special property, or an interest of a temporary or limited nature, must have had the possession.

Error to Buchanan Circuit Court.

STATEMENT OF THE CASE.

This was an action of replevin, brought in the Buchanan circuit court, at the March Term, 1848, by Holliday against Lewis for the recovery of three mules, which were alleged to be the property of Holliday, and to have been taken and detained by Lewis. The mules were replevined by the sheriff and delivered to Holliday.

The plaintiff read in evidence an order subscribed by Archer Gillespie, which authorized plaintiff to receive the possession of any mules and horses which had strayed from the party or been left by the escort of Commodore Stockton, lately under the command of said Gillespie, which order was dated 27th October, 1847.

The court gave the jury the following instructions :

"If the mules in contest belonged to Commodore Stockton, and Stockton, either by himself or through any of his subordinate officers, let the keeping of the mules in the declaration mentioned, to plaintiff, and authorized him to take them into possession, and plaintiff made demand thereof of defendant who had them in possession, before the commencement of this suit, offering reasonable pay for his trouble, then the plaintiff was entitled to the possession thereof, and the jury will find for the plaintiff, but if the plaintiff was not entitled to the possession, the jury will find for the defendant."

"If the jury find for plaintiff, they will find damages for the detention but not for the value, the mules having been delivered to plaintiff by the sheriff on the writ in this case."

"If the jury find for the defendant, they will find the value of the mules and also damages for the use of the same from the time of issuing the writ in this case."

To the giving of the said instructions the defendant excepted.

The jury then found a verdict for the plaintiff, and the defendant moved in arrest of judgment, and to set aside the verdict and give a new trial for reasons assigned, which were severally overruled by the court and the opinions of the court excepted to. Judgment being rendered upon the verdict, against the defendant, he hath brought the case to this court by writ of error, and assigned for error the opinions of the court excepted to.

HAYDEN & VORIES, for plaintiff in error.

ARCHER, *contra*.

[* 406] *RYLAND, J., delivered the opinion of the court.

The only question from the above statement, of any importance for our consideration, is that which respects the plaintiff's right to maintain this action. Can the plaintiff Holliday, who never had the actual possession of the mules in question, and who was not the general owner, maintain replevin against the defendant Lewis, who had the mules in his actual custody?

Chitty, in his Treatise on Pleadings, says a person having a special property in the goods may support trover against a stranger who takes the goods out of his actual possession; as a sheriff, carrier, factor, a warehouseman, consignee, pawnee, or trustee, or an agister of cattle: 1 Chitty's Pleadings, 173. There must be actual possession; the goods must be taken from the possession of him who has the special property.

"An action for an injury to personalty may also be brought in the name of the person having only a special property or interest of a limited or temporary nature therein. But in this case, the general rule seems to be that the party should have had the possession." 1 Chitty's Pleadings, 71.

Greenleaf, speaking of evidence in trover, says there must be shown in the plaintiff a right to the present possession of the goods. If he has only a special property, there must ordinarily be evidence of actual possession. 2 Greenleaf Ev. sec. 640.

In this case, the testimony only shows an authority given to the plaintiff by one Archer W. Gillespie to send for, take and receive any mules or horses which strayed from the party or had been left upon the road by the escort of Commodore R. F. Stockton, under the command of said Gillespie. The plaintiff was merely the agent of said Gillespie, to take and receive the mules or horses that had strayed or been left on the route. He never had these mules in his possession; was not in any way liable over for them to Gillespie, and has no right of action in his own name for them. The court below erred in refusing to give the instructions asked

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for by the defendant in regard to the plaintiff's right to immediate possession; also in regard to the right of a person who has a special property to maintain this action, without actual possession *having been once had. The authorities are [* 407] ample on this subject, and although these here cited speak of the action of trover, they are applicable to replevin.

The court erred in giving the instruction to the jury which appears on the record as the first one given. This instruction does not contain the law of the case.

There is much testimony preserved in the bill of exceptions, which is nothing more than hearsay, and it should not have been given to the jury.

The other Judges concurring, the judgment below is reversed and cause remanded to be further proceeded in accordance with this opinion.

HOLLIDAY, Adm'r. of Fuchs, appellant, v. DOYON, respondent.

15 Mo. 407.

Forcible Entry and Detainer.—Action by Administrator.—Where there was a demise of premises by the intestate, the administrator cannot maintain an action of unlawful detainer.

Appeal from Circuit Court of Buchanan.

HAYDEN, for appellant.

*VORIES, *contra*.

[* 408]

GAMBLE, J., delivered the opinion of the court.

The appellant, Holliday, calling himself administrator of Henry J. Fuchs, filed his complaint before a justice of the peace in Buchanan county against Doyon, alleging that "the defendant willfully and without force, held over a certain room, &c. (describing the property and its situation), after the termination of the time for which it was let to him, *and [* 409] after demand made in writing for the delivery of the

possession thereof by the plaintiff who has the legal right to the possession."

The defendant appeared before the justice, and moved to dismiss the complaint, because the plaintiff sued as administrator, and for other causes assigned, and this motion being overruled, the parties proceeded to trial and the plaintiff had judgment. The defendant appealed to the circuit court, and there renewed his motion to dismiss, which was sustained, and the plaintiff appealed to this court. The only point made is whether the circuit court erred in dismissing the complaint because the plaintiff sued as administrator.

If under the complaint, the plaintiff could only recover by showing a demise, by his intestate, the complaint would be bad, as it would be necessary for him then to show a derivative title to the possession: *Holland v. Reed*, 11 Mo. R. 605; *Picot v. Masterson*, 12 Mo. R. 303. (a) But if under this complaint, the plaintiff might show a demise by himself to the defendant, then the introduction of the words of description ("Administrator of the estate of Henry J. Fuchs") in the commencement of his complaint, did not authorize the circuit court to dismiss it. That he might show a demise by himself to defendant under this complaint, there can be no doubt, and therefore the action of the circuit court was premature and erroneous, and its judgment, with the concurrence of the other Judges, is reversed and the cause remanded.

WALDEN, defendant, v. VALIANT, respondent.

15 Mo. 409.

Garnishment—Note.—A judgment cannot be rendered against a garnishee on a negotiable note that had been assigned before the service of the garnishment.

Appeal from Platte Circuit Court.

ALMOND, for appellant.

(a) But see Gen'l Stat. of 1865, chap. 187, § 38; Wagner's Stat. p. 648.

WILSON & REES, *contra*.

*SCOTT, J., delivered the opinion of the court. [*410]

This was an action of assumpsit, brought by Valiant against William Victor, John Hardin and William Smith, in which the appellant, Walden, was summoned as a garnishee. The proceedings were discontinued as to Hardin and Smith, and a final judgment was rendered against Victor alone. At a term subsequent to the rendition of the judgment, a judgment was rendered against the garnishee, on his interrogatories filed in the cause. So much of the answer of the garnishee as raises the question in the cause, is as follows: "On or about the 25th day of November, A. D. 1846, this garnishee attended a public auction of goods, wares and merchandize, in the town of Weston, in Platte county, Missouri, which goods, wares and merchandize this garnishee understood belonged or had belonged to the said William C. Victor, and were sold by the said defendants, John R. Hardin and William Smith. This garnishee purchased at said auction, goods, wares and merchandize to the amount and value of \$4.76, for which this garnishee executed and delivered to the said John R. Hardin his negotiable promissory note, payable twelve months after the date; said note being dated November 25th, 1846, and bearing interest at the rate of ten per cent. per annum from due till paid. And this garnishee further states that on the 4th January, 1847, the said Jno. R. Hardin transferred and assigned said promissory note to Wm. B. Almond, and then and there delivered to said Wm. *B. Almond said note, and now holds [* 411] the same as he is informed and believes."

This garnishee further states that said Hardin and Smith made the sale of said Victor's goods and chattels, as aforesaid, by virtue of and under an instrument of writing, executed by the said Victor to the said Hardin, on or about the 10th day of November, A. D., 1846, authorizing said Hardin and the defendant, William Smith, to sell and dispose of the same to pay them their fees as his attorneys, and to pay over the residue, if any, to the wife and family of the said Victor, as he is informed and believes."

“And this garnishee further states, that he is informed and believes, that said Hardin assigned said note to said Almond for services as an attorney performed by the said Almond for the said Victor, prior to said auction, under an agreement to that effect made between the said Almond and Hardin and Smith, and also another agreement between the said Hardin and Smith and Victor—both of said agreements having been made prior to said auction, and that said promissory note was paid to the said Almond for said services under the agreements before alluded to, and this garnishee, from his best information, knowledge and belief, believes that said note now legally and equitably belongs to the said William B. Almond.

There was no replication to, nor denial to the answer.

By an agreement between the parties, the correctness of the judgment below on this answer is the only point in the cause to be considered.

It is obvious that the legal title to the note was never in Victor. Hardin held it as trustee, and the inquiry is, whose equity first attached, Almond's or Valiant's? The solution of this question will depend upon the weight to be given to the answer of the garnishee.

The garnishee stands indifferent between the parties. He admits his indebtedness, and it is a matter of no concern to him to whom he discharges it. Not having a personal knowledge of the fact, to whom the debt belongs, he, from information, asserts his belief, that by an agreement long anterior to the garnishment, the proceeds of the note were to be applied to the payment of a debt due William B. Almond, for whose benefit it is obvious this defense is made. The answer not being denied, and being submitted as evidence to the court, warranted a different judgment from that pronounced in the cause. The judgment should be reversed and the other Judges concurring it is reversed.(a)

(a) Gen'l Stat. of 1865, chap. 142, § 26; Wagner's Stat. p. 668.

VEAL, appellant, v. CHARITON COUNTY COURT, respondent.

15 Mo. 412.

School Fund.—A county court having loaned township school funds at ten per cent., has no right, upon the application of the inhabitants of the township, to reduce the rate of interest.

Appeal from Chariton Circuit Court.

TURNER, for appellant.

SCOTT, J., delivered the opinion of the court.

Veal, who was school commissioner of township 55 in range 19, in the county of Chariton, filed his petition in the circuit court of said county, praying for a conditional mandamus to the county court of that county, requiring that body to collect the annual interest due on a bond executed by James Dempsey and others to the said county for the use and benefit of the inhabitants of said township, or to show cause to the contrary.

It appears that the bond bore ten per cent. interest, and that Veal, the commissioner for the said township, which was duly organized for school purposes, had applied to the county court to enforce the payment *of the interest on the bond, [* 413] which was by its terms made payable annually, and that the court had refused to grant the application.

The county court, in answering the mandamus, stated, that at the February term, 1849, James Dempsey presented a petition to said court, signed by a majority of the householders of said township, praying said court to reduce the rate of interest on the said bond from ten to six per cent. Whereupon, it was ordered that Jas. Dempsey, from and after the 1st of January, 1849, pay to the county treasurer six instead of ten per cent. interest on his bond until further ordered, and that the county treasurer be notified of this order. At the February term of the court, 1851, a petition, signed by a portion of the inhabitants of said township, was presented, praying a rescission of the former order, against which there was a remonstrance of some of the inhabitants. The court,

upon a hearing of the petition and remonstrance, ordered that for the future Dempsey pay ten per cent. interest on his debt.

This, in effect, remitted to Dempsey four per cent. of the interest on his debt for upwards of two years.

Upon the filing of the answer, it was demurred to by Veal, and his demurrer was overruled and a judgment for costs rendered against him, from which he appealed to this court.

Section numbered sixteen in every township was granted by the Congress of the United States to this State for the use of the inhabitants of such township for the use of schools. This grant was solemnly accepted by the people of this State, in convention assembled, who, at the same time, declared that it should be the duty of the General Assembly to apply the funds which may arise from such lands in strict conformity to the object of the grant. These sections, having been sold in pursuance to the laws of the State, the money arising from their sale is regarded as a substitute for the land granted. It is a permanent fund, not only for to-day or to-morrow, but for the distant future, and it is both the policy and the duty of the State so to manage it, that its benefits may be experienced by generations yet to come. This may seem impossible, but it is, nevertheless, the duty of those entrusted with the care and management of it, to use all endeavors to perpetuate its advantages as long as possible. It is a great error to suppose that the inhabitants of a township, for the time being, can dispose of or in any way impair the fund. They are the passive recipients of its increase for the use of schools, so long as they are inhabitants of the township, but those who are to come after them have as much right to it as they have, and it is the policy of the law to preserve it for them.

[*414] *The ninth section of the 2d article of the act to provide for the organization, support and government of common schools, entrusts the county courts with the care and management of the school funds of the respective townships within their jurisdiction. The succeeding section of the same article makes it their duty to loan the funds, for the highest rate of interest that can be obtained, not exceeding ten nor less than six per cent. In relation to these funds, the county courts are trustees. They have

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no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and the interest of these funds. If they can give away the one, they can give away the other. If a neighbor should put money in their hands to loan out for him at interest, and they should give it away or release the interest, would they not expect to make it good out of their own purses? What is the difference between that case and this? Would they not be ashamed, when asked for the money with which they were trusted, to offer an excuse for not paying it that all the people of the county in which they lived had petitioned them to give it away, and they had done so? The welfare of the State is concerned in the education of her children. She has provided and is providing means for that purpose, not only for those now in existence but for those who may come after them. The fund, as has been said, is a permanent one, and if every man, woman and child in a township should petition the county court to give it away, that which is by law entrusted to it, for the education of its children, it should, without hesitation, reject their prayer. The will of the people, when expressed in relation to matters in which they have a right to interfere, should be respected by their agents, but when they call upon those to whom is confided the administration of the laws, to sacrifice their trusts and violate their oath, their will should be disregarded.

The other Judges concurring, the judgment will be reversed and the cause remanded.

KUYKENDALL, use of Middleton, Perry & Co., plaintiff in error, v.
McDONALD & VINEYARD, defendants in error.

15 Mo. 416.

1. *Fraudulent Conveyance—Evidence.*—The continued possession of personal property, after the sale of it, is presumptive evidence of fraud, and becomes conclusive, unless the vendee shows that the sale was made in good faith, and without any intent to defraud creditors.^(a)

(a) But see Gen'l Stat. of 1865, chap. 107, § 10; Wagner's Stat., p. 281.

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2. *Fraud—Question for Jury.*—In all cases arising under the 10th section of the act concerning fraudulent conveyances, the jury are the triers whether the transaction is fraudulent or not. And in order to take a sale of goods out of the statute, it must not only be for a valuable consideration, but also *bona fide*.
3. *Creditor—Preference.*—A debtor may give a preference to a particular creditor, or set of creditors, by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere screen to secure the property to himself.

Error to Platte Circuit Court.

LEONARD, for plaintiff in error.

[* 417] *HAYDEN & GARDENHIRE, *contra*.

SCOTT, J., delivered the opinion of the court.

McDonald, the defendant, having obtained a judgment against William G. Burnes and John S. Light, levied his execution upon property in the possession of Light. Thereupon, Middleton, Perry & Co., claimed the property, and demanded an inquisition by the sheriff to ascertain its ownership. Middleton, Perry & Co., having obtained a verdict, McDonald, the plaintiff in the execution against Burnes & Light (but defendant here), then gave to the sheriff a bond of indemnity, and required him to sell the property levied on. This was accordingly done, and this suit was brought to the use of Middleton, Perry & Co., the successful claimants of the property, seized under execution, in the name of James Kuykendall, to whom, as sheriff, the bond was executed.

The defense to this action was, that the conveyance of the property to Middleton, Perry & Co., executed by Light to them, and under which they claimed, was void, being made to hinder and delay his creditors. In consequence of the directions of the court below, the plaintiff *took a non-suit, and after an unsuccessful motion to set it aside, sued out a writ of error from this court.

Middleton, Perry & Co., claimed the property levied on by virtue of a conveyance made by Light, the 6th April, 1846, and recorded. The debt due by Light to McDonald, on which there

were judgment and execution, was payable the 3rd June, 1845. The property levied on, and other property not taken by the sheriff, were conveyed to Middleton, Perry & Co., for the consideration of \$1500, as expressed in the deed. Light also executed to Middleton, Perry & Co., a deed for two hundred and forty acres of land, in consideration of the sum of \$1000. The land was public land, and in the opinion of some of the witnesses, not worth more than the government price, though at the trial it was proved to be then worth \$1200. The property mentioned in the first deed was, at the time of sale, delivered to Middleton, Perry & Co., and immediately restored to Light, who also continued in possession of the land conveyed. There was evidence conducing to show that the property conveyed by Light was worth much more than was paid for it. The property levied on by the sheriff was found in the possession of Light. Evidence was produced, showing that Light was indebted to Middleton, Perry & Co., in a considerable sum, at the time of the conveyances, and of their assuming to pay, and paying debts, due by him to others for a large amount.

It would be an endless task to copy and review all the instructions that were given and refused on the trial of this cause, and it is not deemed necessary, as the argument in this court was confined singly to the question, whether the remaining in possession by the vendee, after an absolute sale of personal property is fraud *per se*, and so to be declared by the court as a matter of law; or whether under the 10th section of the act concerning fraudulent conveyances, it only creates a presumption of fraud, which may be repelled by evidence satisfactory to the jury, that the sale was made in good faith and without any intent to defraud creditors.

This revives the old question, whether the continuing in possession of personal property after a sale is a fraud in law, and so to be declared by the court; or whether it is a fact to be put to the jury as evidence of fraud, who are the triers whether the transaction is fraudulent or not. The contrariety of opinion entertained by different courts, and the conflicting views in the same courts in relation to this question, induced the legislature, at the

late session, to interfere and settle it definitely. It was hoped this had been done, and that the matter would not be again agitated. The 4th section of the act referred to, pre-
[* 419] scribes how *gifts of goods may escape the imputation of fraud, resulting from a want of possession in the donee.

The 8th section shows how deeds of trust and mortgages, affected with a charge of fraud, growing out of the want of possession in the mortgagee and trustee, may avoid a like imputation. But the case of an absolute sale, with possession continuing in the vendor, stood on different considerations, and no provision was made for its protection. It was made a presumption of fraud, and a conclusive one, unless the jury was satisfied that it was made in good faith, without any intent to defraud creditors. The 10th section of the act was borrowed from the code of New York. The section, however, in that code, did not contain the words, "to the jury," and their omission continued the old controversy, whether fraud was a question of law for the determination of the court, or a question of fact to be submitted to a jury. It was to settle this controversy that the words "to the jury" were inserted in our statute, and it is submitted that their insertion leaves no doubt but that in all cases arising under the 10th section, the jury are the triers whether the transaction is fraudulent or not. The continued possession after the sale, is presumptive evidence of fraud, and it becomes conclusive, unless the vendee shows that the sale was made in good faith, and without any intent to defraud creditors. The possession in the vendor is all that need be shown, in the first instance by the creditor contesting the validity of the transaction; and that being shown, the statute presumes it to be fraudulent; then the onus is thrown on the claimant of the property under the sale, to show from all the circumstances surrounding the transaction its true character, in order to repel the presumption of fraud; and if he fails in his evidence to show that the sale was made in good faith, without any intent to defraud creditors, the presumption of fraud first raised by the law becomes conclusive evidence of the fact. In determining this question, the jury should not be satisfied with the mere absence of direct evidence of a fraudulent intent, in connection with proof of a val-

uable consideration. They should be satisfied that there was some good and sufficient reasons for leaving the property in the possession of the vendor. An agreement to permit a vendor to remain in possession of goods, after an absolute sale, is not the common course of business. It must therefore excite suspicion, and the interests of creditors, in all such cases, imperiously require that the vendee clearly explain how an absolute sale could have been bona fide, and yet the vendor retain the use and possession of the property sold.(a)

In order to take a sale of goods out of the statute, it must not only be for a valuable consideration, but also bona fide ; as if one knowing of a *judgment and execution [* 420] against another, goes and purchases his goods, in order to defeat the execution ; although he may take possession, yet the sale will be judged fraudulent because his purpose is iniquitous. 1 Bur. 474. But cases of this kind should not be confounded with those which only amount to a giving of preference to one creditor over another. A debtor may give a preference to a particular creditor, or set of creditors, by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere screen to secure the property to himself. The pendency of another creditor's suit is immaterial, and the transaction is valid though done to defeat that creditor's claim. 5 Tenn. R. 235 ; 3 M. & S. 371.(b)

In the many cases which have lately come up, arising under the statute concerning fraudulent conveyances, a great deal has been said about "a valuable consideration." Certainly a monied consideration for an assignment of goods much disproportioned to the value of goods assigned, would not take a conveyance out of the statute. The consideration must be adequate. Not that courts will weigh the value of the goods sold and the price received in very nice scales, but all circumstances considered, there should be a reasonable and fair proportion between the one and the other. Cases in which the question of inadequacy of consideration arises between the

(a) State v. Smith, 31 Mo. 566 ; State v. Rosenfield, 35 Mo. 472 ; Hartman v. Vogel, 41 Mo. 570. But see Clafin v. Rosenberg, 42 Mo. 439.

(b) Richards v. Levin, 16 Mo. 596 ; Potter v. McDowell, 31 Mo. 74.

The State, to the use of Cowan, v. Modrell *et al.* 15 Mo.

grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. What inadequacy of consideration would induce a court to set aside a conveyance at the instance of the grantor, on the ground of imposition, is an entirely different question from that degree of inadequacy which would avoid an assignment on the ground of fraud in a suit by creditor or purchaser against the assignee. Inadequacy of price, when unreasonable, is evidence of a secret trust, and it is prima facie evidence that a conveyance is not bona fide if it is accompanied with any trust. (a) 3 Met. 332, Troyne's case. The law will not suffer a creditor, although he may have a just demand against his debtor, to use that debt as a screen to protect the debtor's estate from his other creditors, when that estate exceeds much in value the amount of the debt. When a creditor, by fraud, will attempt to defeat the claims of other creditors, there is no hardship in postponing his demand, although a just one, to those which he has endeavored to defeat.

The law not requiring absolute bills of sale of personal [* 421] property to be recorded, the placing them upon record being an unauthorized act, avails the parties nothing.

The other Judges concurring, the judgment will be reversed and the cause remanded.

THE STATE, to the use of COWAN, plaintiff in error, v. MODRELL, *et al.*, defendants in error.

15 Mo. 421.

1. *Set-off—Action on Administrator's Bond.*—In an action upon the bond of executors, against the principals and securities, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed.

(a) Robinson v. Robards, *post.* p. 459.

The State, to the use of Cowan, v. Modrell *et al.* 15 Mo.

2. *Executor—Action against—Pleading.*—In an action against an executor, on his bond, to compel payment of an allowed demand, the petition must contain an averment that an order of the court has been made for its payment and that assets have come to his hands that could be lawfully so applied.

Error to Buchanan Circuit Court.

VORIES, for plaintiff in error.

LOAN & GARDENHIRE, *contra*.

GAMBLE, J., delivered the opinion of the court. [* 424]

The action in this case being brought upon the bond of two executors, against the principals and securities, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed. (a) There must be a debt on the part of the plaintiff, as well as upon the part of the defendant, to authorize a set-off. The test given by Chief Justice Kent is, that the indebtedness for which the action is brought, must be such that if the plaintiff were sued by the defendant upon the set-off claimed, he could claim his cause of action in that suit as a set-off. (b) *Gordon v. Bourne*, 2 J. R. 155. If the executors, who are the principals in the bond here declared upon, were to sue Cowan upon his alleged indebtedness to their testator, could he use as a set-off his present claim for damages for their failure to discharge their duties as executors? Clearly not.

Again, the claim in the present action is a claim against the principal and securities in the bond in their individual capacity, founded upon the misconduct of the executors. Against this claim an indebtedness to the testator of two of the defendants cannot be set off. (c)

As this disposes of the question of set-off, it is unnecessary to consider the question whether the set-off admitted in the circuit

(a) *Johnson v. Jones*, 16 Mo. 494; *Mahan v. Ross*, 18 Mo. 121; *Brak^e v. Corning*, 19 Mo. 125.

(b) *Nickerson v. Gilliam*, 29 Mo. 456; *McPherson v. Meek*, 30 Mo. 343.

(c) *Kent v. Rogers*, 24 Mo. 306; *Vastine v. Dinan*, 42 Mo. 269.

court, was barred by the statute of limitation. The instructions of the court below being given under a misapprehension of the law of set-off, the judgment would be reversed but for the fact that the petition of the plaintiff shows no legal cause of action.

The petition states the allowance of a demand by the county court against the estate of Robert Modrell, the testator, in favor of the plaintiff, but it does not show by any averment that any order of the court has ever been made for its payment, or that any assets have ever come to the hands of the executors which ought to have been or could lawfully be applied to its payment. (a)

Although it alleges that assets have come to the hands of the executors, and have been converted by them, the plaintiff has not been injured thereby, if there are demands allowed against the estate in a class prior to his, that would absorb all the assets of the estate.

The petition, then, not showing that the plaintiff is a party injured by the breach of the condition, fails to show any right to commence this suit for his benefit, and consequently he is rightly out of court, although for a wrong reason. The judgment is affirmed.

CARGILL & OWEN, appellants, v. CORBY, respondent.

15 Mo. 425.

1. *Partnership*.—Private stipulations between partners do not affect the public, or those who deal with them, without notice of their agreement.
2. *Partners—Powers*.—The general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority, and may be rebutted by notice of the absence of such authority.

Appeal from Buchanan Circuit Court.

GARDENHIRE, for appellants.

LOAN & HAYDEN, *contra*.

(a) State v. Collier, *ante*. p. 293.

GAMBLE, J., delivered the opinion of the court. [* 426]

Cargill and Owen composed a firm under the style of Cargill & Co. Corby was a member of a firm trading with the Indians and having a trading establishment at Bellevue in the Indian territory. His partner, one Gingry, conducted the establishment, and the style of the firm was Corby & Co. Flour was one of the articles in which they dealt. Cargill & Co. sent flour up the Missouri river, and at Bellevue sold and delivered to Gingry about fifty barrels, for the price of which they received an order drawn by Gingry upon Corby. This order was presented to Corby, and he refused to pay it. Three witnesses testify as to the conversation between Corby and Owen at the time the order was presented; one says Corby told Owen "that Gingry had no right to bind him in any contract," another says Corby told Owen "that the drawer of the draft had no right to contract debts for him;" the third says that Corby refused to pay the draft, "because Gingry had no funds in his hands with which to pay it." The presentation of the order and the conversation between Corby and Owen occurred in October, 1850. The present suit is founded on a note made by Gingry, in the name of Corby & Co. in favor Cargill & Co., and dated January 19th, 1851. This note was presented to Corby for payment in February, 1851, and on that occasion Corby refused to pay it, saying it was the same demand that had been previously presented.

At the trial, the court was asked by the plaintiffs to give the following instructions, which were refused:

1st. If Corby and Gingry were partners at the time the note sued upon bears date, and Gingry executed the note in the partnership name, the presumption is that the note related to the partnership and was on partnership account, and unless the defendant rebuts this presumption *by showing that [* 427] the note did not relate to the partnership, and was not on partnership account, they will find for the plaintiffs.

2d. If flour was an article in which Corby & Co. dealt at Bellevue, and plaintiffs delivered flour to Gingry there, for which the note sued on was executed, they will find for the plaintiffs, unless the defendant has shown that by a private arrangement between

himself and Gingry the latter had no right to purchase on partnership account, and plaintiffs had notice of that fact, before the delivery of the flour.

The court, at the request of the defendant, gave the two following instructions :

1st. That if the jury believe from the evidence that defendant Corby notified plaintiffs, or either of them, that the said Gingry had no authority to bind him by any contract, and Gingry in fact had no authority, and afterwards the said plaintiffs took from the said J. A. Gingry the note sued on, they will find for the defendant.

2d. That if the jury believe from the evidence that the only partnership existing between Corby and Gingry was a partnership for the purpose of carrying on trade with the Indians in the Indian territory, they will find for the defendant, unless they further find from the evidence that it was necessary for the purpose of carrying on the business of said partnership, or usual for other companies trading with the Indians in the Indian country, to execute promissory notes.

The plaintiffs took a non-suit, and, having moved to set it aside, bring their case here by appeal.

The ground upon which Corby rested his defense in the circuit court was, that his partner Gingry had no authority to bind him in any contract, and that the plaintiffs, before they took the present note from him, were apprised of this limitation of his powers. The only evidence given of any restriction upon the general powers of Gingry as a partner, to purchase goods, is in the testimony of a witness, Thomas Henry, who says "Corby was to buy and furnish the firm with goods, and Gingry was to sell or trade with the Indians, and that flour was a commodity in which the firm dealt."

If, by the terms of agreement between the partners, Corby & Gingry, the latter had been expressly prohibited from purchasing any of the goods in the sale of which the trade was carried on, still a third person selling to him such merchandise upon credit, and receiving the paper of the firm without notice of any limitation of his powers as partner, may compel the payment of the

debt as well from Corby as from Gingry. The private stipulations between partners do not affect the public, or those who deal with them without notice of their agreement. The *doctrine on this subject is well stated by Chief Justice [* 428] Marshall, in *Winship v. The Bank of the United States*, 5 Peters, 561. He says: "If the business be to buy and sell, then the individual (partner) buys and sells for the company and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of co-partnership are perhaps never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the rights of the parties as between themselves. The trading world with whom the company is in perpetual intercourse cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those by whom they are unknown, and who trust to the general and well-established commercial law."

As it was the business of the firm of Corby & Co. to buy and sell goods, and as flour was a commodity in which they dealt, there could be no doubt of the authority of the partner Gingry to purchase flour, or any of the articles in which their trade was carried on, and to purchase them upon credit and to give the note of the firm for the payment of the price; unless he was prohibited from purchasing or from giving notes by the articles of co-partnership; and if he had been so prohibited, a person dealing with him and selling flour to him in ignorance of such prohibition, would still be entitled to enforce the note of the firm given upon

such sale against all the partners. The question of Corby's liability in this action is not upon the sale of flour made at Bellevue to Gingry, for the petition is not upon that cause of action; but upon the note subsequently given by Gingry; a note given after Corby, as some witnesses testify, had denied the power of Gingry to bind him in any contract, and after the payees of the note were acquainted with the denial. Lord Ellenborough, in *Gallway v. Mathew and Smithson*, 10 East. R. 264, says: "The general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority; and that implication was rebutted in this instance by the notice given by [* 429] *Smithson, who is now sought to be charged, which reached the plaintiff warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership name to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the other.

The first instruction given for the defendant in this case is founded upon the law as it was declared by Lord Ellenborough in the passage quoted and put the case fairly to the jury. If that instruction stood alone, the judgment of the circuit court would not be disturbed. But in the second instruction, the court directs the attention of the jury to a different question and misstates the law. The jury are told in this instruction, that if the only partnership between Corby & Gingry, was for the purpose of carrying on trade with the Indians in the Indian territory, they should find for the defendants, unless they further find from the evidence that it was necessary for the purpose of carrying on that business, or usual for other companies trading with the Indians in the Indian country, to execute promissory notes. This instruction assumes that *prima facie* partners engaged in the Indian trade have not power to execute promissory notes and that the burden of showing the partners liable on such a note, is upon the holder, who is to

show, either, that it was necessary to the conduct of the business or that other companies engaged in that trade made such notes. This is an incorrect statement of the law.

The trade with the Indians consists in buying goods and selling or bartering them to the Indians. The witness Henry testified in this case, that Corby was "to buy and furnish the firm with goods and that Gingry was to sell or trade with the Indians;" now if Corby in purchasing goods for the firm upon credit had given the note of the firm, it would be difficult to make a distinction between his right to bind his partner in such case and in a case where the goods were to be sold at a store in any town within the State. The fact that the firm dealt in buying goods and selling them to Indians in the Indian territory, does not of itself limit the powers of the partners, or require any evidence of usage or necessity in order to hold the partners liable on a partnership security.

The judgment will be reversed and the cause remanded.

STATE, respondent, v. LADD, appellant.

15 Mo. 430.

Criminal Law—Indictment.—In an indictment for selling liquor without license, the name of the person to whom sold, and the price, need not be stated.

Appeal from Buchanan Circuit Court.

VORIES & S. L. LEONARD, for appellant.

GARDENHIRE, Attorney General, *contra*.

RYLAND, J., delivered the opinion of the court. [431]

The points relied upon by counsel for the defendant below to reverse the judgment in this case, are the insufficiency of the indictment and the refusal of the court to give the instruction prayed for by the defendant to the jury.

I will first consider the indictment. It charges, that the defendant sold intoxicating liquors in a quantity less than a quart, to-wit:

one pint of whisky, one pint of gin, &c., to divers persons to the jurors unknown, without any license, &c. The only objection made to it rests on the omission to state the price for which the liquor was sold. There is no price mentioned in the indictment at and for which the liquor was sold. The defendant relies upon the case of *Neales v. The State*, 10 Mo. R. 500. In this case it was said by the court, "that the charge is that the defendant did then and there unlawfully sell intoxicating liquor in a quantity less than a quart. To whom sold, the description of the liquor sold, and the price for which it was sold are entirely omitted in the indictment; and yet this would appear necessary to be stated, otherwise how can the court see that an offense has been committed, or the defendant be apprized of the nature of the accusation against him and be able to prepare for his defense." In answer to this, I remark, that these objections were not made to the indictment in *Neales'* case, nor was the court called upon to notice the indictment in these particulars. Strictly, this point was not before the court in that case, and what was said in relation thereto, may be considered as *obiter dicta*.

This court in the case of *Page v. The State*, 6 Mo. Rep. 205, upon an indictment for selling clocks without a license, declared that a sale must be alleged, but it was not necessary to allege to whom it was made nor the price given.

The offense is confined to the person selling, it does [* 432] not injure or * affect the rights of another person. The charge is complete, when it alleges that the sale was of intoxicating liquor in less quantity than one quart, (viz:) a pint, without license. The person to whom sold and the price are not material; nor do I think the omission to insert the name or the price can be considered as vitiating the indictment. In the case of the *People v. Adams*, 17 Wend. 475, the supreme court of New York, Ch. Jus. Nelson delivering the opinion, decided that it was not necessary in an indictment for selling spirituous liquors without license, to specify the names of the persons to whom the sales were made. "The court remarked, that the offense upon the statute consists in the act of selling the spirituous liquors without license, and therefore the designation of the persons to whom sold

is in no way material to constitute it." By parity of reasoning the price is equally immaterial. This is a strong case in support of this indictment against Ladd.

In the case of *The State v. Munger*, 15 Vermont Rep. 295, upon an indictment for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom they were sold. In this case the names of the persons to whom the liquors were sold and the price at which the liquors were sold are entirely omitted. The indictment is set forth containing two counts, neither of which mentioned the price or names of the persons to whom the defendant is charged to have sold; yet it was held sufficient. In this last case the court said: "It is contended that the indictment is bad, because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The offense complained of works no injury upon the individual rights of a person to whom the sale was made, and none are supposed to be violated. It has no analogy to an indictment for theft, to which it was likened by the counsel, where the violation of private rights enters into the very essence of the crime."

The sale of intoxicating liquor, *ex vi termini*, includes a person to whom it was made, and a price—and I cannot see any reason or necessity for the pleader to insert either in the indictment. Under this view of the law the indictment is sufficient.

If it be not necessary to name the persons to whom the liquor was sold, and from the above authorities I am satisfied it is not, then the court did not err in refusing to give the defendant's instruction. In the case of *Hulstead v. The Commonwealth*, 5 Leigh's Report, 724, the general court of Virginia, held unanimously, "that, on the trial of an indictment for retailing spirits without a license, charging that the sale *was [* 433] made 'to persons to the jurors unknown,' proof, that the persons were actually known to the jury when it found the indictment, does not constitute a variance between the proof and the allegations of the indictment, so as to defeat the prosecution.

This is in conformity with the decision of this court in *Dove's*

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case, 2 Virg. cases 26, where this court decided that an indictment for retailing spirits need not name the person to whom the liquor was sold. The insertion therefore of the words "to persons to the jurors unknown," must be taken as surplusage. The case of *Hays v. The State*, 13 Mo. Rep. 246, contains nothing against the views herein expressed.

From the whole of the present case appearing by the record before us, I find nothing requiring the interference of this court. The other Judges concurring, the judgment of the court below is affirmed. (a)

PRICE, respondent, v. JOHNSON COUNTY, appellant.

15 Mo. 433.

1. *Fraud*.—A county court has power to set aside the settlement of a collector for fraud at any time during the term.
2. *Injunction*.—An injunction is a release of errors at law, and the proceedings on it are not appellate in their nature.

Appeal from Henry Circuit Court.

ADAMS & HICKS, for appellant.

LEONARD & HAYDEN, *contra*.

[* 437] *SCOTT, J., delivered the opinion of the court.

This was a bill in chancery, filed by Price against Johnson county, in which it is alleged: That Price was elected sheriff of said county for the years 1846 and '47, and thereby became ex-officio collector of the revenue; that at the August term of the county court for said county, on the 17th day of the month, he settled with said court for the revenue for the year 1847, on which settlement he became indebted to the county \$300 and upwards; that this settlement was approved and entered of record; that as

(a) *State v. Miller*, 24 Mo. 532; *State v. Guyott*, 26 Mo. 62; *State v. Spain*, 29 Mo. 415; *State v. Fanning*, 38 Mo. 359 (commenting on *State v. Hays*, 36 Mo. 80); *State v. Melton*, *id.* 363; *State v. Rogers*, 39 Mo. 431.

he collected the revenue, he from time to time paid it into the county treasury and took J. S. Raynol's receipt therefor, who was then the treasurer; that he had never before made a settlement, and that then made was voluntary on his part. The day after the settlement, the balance found due was paid into the treasury, and on the presentation of the treasurer's receipt for said sum, he obtained a quietus from the clerk of the county court under his seal of office; that on the same day he paid \$80 and upwards, due for license, &c., and obtained the clerk's receipt for the same; that on the 17th August, 1848, he obtained from the county court, under seal, a certificate that the revenue for the year 1846 had been paid; that on the 23d day of August, during the same term, the county court set aside the said settlement, and issued a summons to him (Price) to appear on the 28th day of the month, to have the previous settlement corrected; that he was served with the notice required on the same day the order was made requiring him to be summoned, but he did not appear, and on the day appointed, on a re-examination of his accounts, he was charged with the sum of \$1393.94; and at the next term of the said court, on the 28th November, a judgment for said sum was rendered against him, with thirty per cent. interest thereon per annum.

On this state of *facts, an injunction, on the ground [* 438] that the proceedings of the county court were void, it having no authority to set aside the first settlement, was prayed and granted.

From the various answers and the evidence in the cause, it appears that Price, the complainant, was sheriff of Johnson county for the years 1844, 5, 6, 7; that as he would collect the revenue from time to time, he would take single receipts from the treasurer for the several sums so paid, and when a final settlement was to be made for the whole year, these single receipts would be given up, and duplicate receipts for the amount of them taken, by which a quietus was obtained from the clerk of the county court; that in June, 1847, Price, under pretense that he wanted to settle for the revenue due for 1845, obtained from the treasurer duplicate receipts for the sum of \$1916.95, being the amount due for that year under a promise that the single receipts, whose sums were

included in the above sum of \$1916.95, should be delivered up to the treasurer. These single receipts never were delivered, and so far from it, Price introduced them into the settlement of August, 1848, and again got credit for them in that settlement. These facts appearing to the court, Price was informed that the settlement would be set aside unless he appeared and explained the matter. This Price declined to do, and on the 23rd of August the court vacated the order of settlement made on the 17th, and directed Price to be summoned to appear and make a settlement of his accounts on the 28th day of the month. Price was duly served with the order, but refused to appear, and on the day appointed the court proceeded to a settlement of his accounts, and found him indebted to the county in the sum of \$1393.94, and at the November term of said court entered judgment against him for that amount with thirty per cent. per annum interest. between the settlement in August and the rendition of the judgment in November, the judges who acted in August had been replaced by others. Price told one of the judges who made settlement with him, and who waited on him to urge him to appear and show cause why the first settlement should not be set aside, that he had receipts to the amount of \$500, or \$600, or \$700, which the county treasurer, might have if they would do him any good. Price gave as reasons for not appearing, the advice of counsel and a belief that the judges were prepossessed in favor of the treasurer.

From the view we have taken of this matter, the foregoing general statement is sufficient for a proper understanding of the cause and the points on which it turns. The court below entered a decree similar to *that entered in the county court, dissolved the injunction and dismissed the bill; from which decree the complainant appealed.

The first point raised by the complainant is, that the county court misconceived its authority in proceeding against him under the statute regulating county treasuries, instead of that concerning the revenue. The fourth section of the fourth article of the revenue act prescribes that every collector of the revenue, having settled according to law, shall forthwith pay the amount found

due into the county treasury, and take the clerk's receipt therefor. The fifth section of the same article imposes a penalty of two and a half per cent. a month for a failure to pay over, but is silent as to any remedy for the coercion of payment. The forty-fifth section of the third article of the same act, gives the process of attachment merely to compel a settlement, not to enforce payment. So far, then, as the county revenue is concerned, this act clearly fails to provide an efficient mode for its collection. Indeed, the main scope of the general revenue law is to provide for the assessing the State and county revenue, and for collecting the State revenue. The act regulating county treasuries is that designed to govern the conduct of those entrusted with the collection of the county revenue.

The first section of the second article of this act prescribes that all collectors chargeable with any money belonging to the county shall settle their accounts at each stated term of the county court. But it is objected that this section does not contemplate settlements for the county revenue arising from taxes, for that revenue is payable only once a year, and, therefore, there could be no quarterly settlement for it. But suppose that the collector fails to make settlements for the county revenue, is there no remedy but the slow and tedious one of a suit upon his bond, or that by attachment, which may be so easily evaded? This shows the policy of the second section of the above recited act, which declares that if any person, chargeable with money belonging to any county, shall fail to make settlement as above directed, the court shall adjust his accounts according to the best information they can obtain.

If there is a summary method for coercing a settlement for one species of revenue, why not for all? Is there any difference in principle between compelling a settlement for one species of revenue, and not another? If a collector has revenue for which he failed to make settlement, he is certainly chargeable with money belonging to the county, and, if so, he is subject to the provisions of the act regulating county treasurers. Because he is required to make but one settlement a year for county taxes, we are not to construe the act in such a way as will exempt him from

[* 440] the obligation of making any settlement at all under *its provisions. But it is said that Price had made his settlement, and, therefore, the power of the county court in relation to that matter was *functus officio*, and another settlement could not be required of him. The settlement made by Price on the 17th August had been set aside, and there was no longer a barrier in the way. The county court clearly had power to set aside the settlement during the term. If a collector procures the entry of a settlement by forgery, or by falsehood and fraud, and the court should have reason to believe that it was procured by these means, would it not be in its power during the term to set the entry aside and require of the collector another settlement? Would this be a settlement according to law, which is demanded by the statute? The mere setting aside the settlement was no direct injury to Price. By that act his rights were not compromised. It did not commit the court against restoring the entry, should it prove to have been correct. This was the most suitable mode of procedure. It was the logical method of effecting the design in view. If I may so speak, it was the only manner of avoiding the illogical *exceptio ejusdem rei cujus petitur dissolutio*, which it might have been foreseen would be urged in behalf of Price. It was the re-examination of his account and finding a greater balance against him than was ascertained at the previous settlement that caused the injury, if any, to Price. Of this settlement he had ample notice. The case of Caldwell & Lockridge, 9 Mo. Rep. (a), is not opposed to this. There it was held that the setting aside of a judgment in favor of an administrator, after he had made a full settlement of his estate, and resigned, and the entering of a judgment against him, without notice, though during the same term, was void. In that case, the setting aside of the first judgment and the entering of the second were one and the same act. It was all done at once, *eo instanti*. Here the judgment is merely set aside and the party required to attend at a future day, of which he had due notice, before any other judgment was rendered against him. It is obvious that this case is distinguishable from that of Caldwell & Lockridge. General references made use of in delivering an

(a) Page 358.

opinion must always be construed in reference to the facts and circumstances of the case in which they are uttered. In the cause now under consideration, had the county court rendered judgment against Price on the same day on which the settlement was vacated, and had nothing further been done, then it might have been contended that the cases were parallel.

This view of the subject relieves the court from the necessity of examining some of the questions which were debated in the argument of this cause. The county court having jurisdiction to enter the *judgment sought to be enjoined, [* 441] there was no authority to enter into an examination of the merits of the judgment of the county court. The injunction was a release of errors at law, and the proceedings on an injunction are not appellate in their nature. An injunction is only granted for the reason that, by the course of proceedings established by law in the court in which the judgment was rendered, the party could not make his defense, or that, since the trial, something has transpired which would make it inequitable to enforce the judgment. We are satisfied with the justice of the judgment of the county court. There is no real hardship on Price in this matter. He was badly advised, considering his character was involved. He had long been honored by the people of the county in which he resided. He knew that there was a blasting imputation on his character involved in the proceedings of the county court; yet, yielding to the promptings of self-interest, he refused to avail himself of the opportunity of defense offered, under the delusive hope that the technicality of a formal receipt would relieve him from any liability that might be imposed, upon the re-examination of his account. The pretense that the judges were prejudiced against him, was fallacious. If the judges who made the settlement in August were prejudiced, they had been replaced by others, and he had an opportunity in November following to appear before another bench of judges, and show that the first settlement was correct. This he failed to do. After the law, in its mildness, has offered a party two opportunities of investigating the merits of a judgment against him, and he has refused to avail himself of them, it is with a bad grace that he

appeals to the aid of a court of equity, and the ungraciousness of the act is heightened when it is considered that in coming into equity he only insists on a supposed technical advantage he had acquired at law.

Whether Raynol was a competent witness is not a matter material to be determined from the view that has been taken of this cause. If he was primarily liable for the money which his evidence would show was due from Price, although he had the same advantage as Price of a settlement in his favor, yet it appears he was willing to forego it and enter into a re-examination of his accounts. There is enough evidence in the record, when the conduct of Price is taken into consideration, to establish the justice of the judgment against him, without relying on that of the county treasurer.

The other Judges concurring, the decree of the circuit court will be reversed, and a decree entered dissolving the injunction and dismissing the bill.

MOONEY, appellant, v. WILLIAMS, respondent.

15 Mo. 442.

1. *Evidence—Account.*—The date at the head of an account does not preclude the plaintiff from proving the time when the various items accrued. It does not pre-suppose the entire indebtedness to have accrued prior to that time.

Appeal from Texas Circuit Court.

RYLAND, J., delivered the opinion of the court.

James Mooney sued Andrew J. Williams before a justice of the peace, in Texas county, in which an appeal was taken to the circuit court of said county.

In June, 1848, at the regular term of the circuit court, the appeal came on to be tried. The plaintiff claimed upon the following account, which I here copy :

"February 1st, 1845.

Andrew J. Williams to James Mooney, Dr.

To eight months' board at one dollar per week.....	\$34 00
Keeping and feeding one horse called Wild Jim, twelve months, at one dollar per week.....	52 00
Paid to Jackson Brunner for shoeing Wild Jim.....	2 00
Three months' labor keeping Wild Jim in the season of 1845	30 00
Paid to John Wilson for shoeing Wild Jim in 1845.....	1 50
Paid to Bates & Bennett for one pair of shoes for Williams,	1 38
Paid one dollar and forty cents cash.....	1 40
Paid to Smiley for shoeing Wild Jim.....	2 00
Paid C. H. Frost, Williams' taxes.....	2 25
One Cirsingle.....	75

\$127 28

Due on the above account..... \$69 78

Received on the above account..... \$57 50"

The plaintiff then offered to prove the items in this account, but the court refused to let him give any evidence to the jury of any item in the account, that accrued after the date as stated at the head of the account, viz., the 1st day of February, 1845, and confined his *evidence to transactions prior to that [* 443] date; and instructed the jury to disregard any evidence of any items accruing after that date; holding the plaintiff concluded by his date at the head of his account.

The plaintiff thereupon took a non-suit moved afterwards to set it aside, which motion was overruled, and excepted to, bill of exceptions filed and the case comes here by appeal.

The only question for our consideration, arises on the ruling of the court in rejecting evidence of any item in the plaintiff's account accruing after 1st day of February, 1845.

In this we think the court erred. We do not hold that the date of the account at the head concludes the plaintiff from proving the time when the various items accrued. Nor do we think that date pre-supposes the entire indebtedness to have accrued prior to

that time. One item in the account itself amounting to \$30, is for three months' labor in keeping the horse, in the season of 1845, and clearly shows that it was not the plaintiff's understanding that his whole account was due on the 1st day of February, 1845.

It is rather to be supposed it was placed there to keep him from going behind that date, placed there to show the beginning instead of the end, and not to mark the accruing of any one item in the account. However this may be, the court erred in not permitting him to prove his account, irrespective of the date at the head. Such rigid construction of the accounts of illiterate men would tend to subvert justice. Plain, honest but awkward men are not skilled in making out accounts with mercantile exactitude. In proceedings in cases arising before justices of the peace, much liberality is allowed in construing the acts of the parties as well as of the justices themselves.

The other Judges concurring, the judgment below is reversed and this cause remanded, to be proceeded with further in accordance with this opinion.

YELDELL & BARNES, appellants, v. STEMMONS, respondent.

15 Mo. 443.

1. *Replevin—Defense—Estoppel.*—A. mortgaged certain chattels of which he retained the possession. At a sheriff's sale, under an execution against A., these chattels were purchased by B., who brought replevin against A. *Held*, that A. is not estopped from setting up the defense that he had no interest in the goods subject to sale under execution.
2. *Execution—Equitable Interest.*—An equitable interest in chattels cannot be sold under execution. A sheriff must actually seize the property before he can sell.

Appeal from Boone Circuit Court.

LEONARD & HAYDEN, for appellants.

CLARK, *contra*.

SCOTT, J., delivered the opinion of the court. [445]

This was an action of replevin, begun by the appellants against the appellee for three slaves and a ferry boat, purchased by the appellants at a sale under an execution against the appellee. The interest of the appellee in the slaves and boat was purchased by the appellants, who were not the plaintiffs in execution under which the sale took place, for the sum of two dollars. The appellee was mortgagor in possession of the property in controversy at the time of sale, and his equity of redemption was foreclosed during the pendency of this suit. The appellants having failed in their action, damages were assessed against them to the amount of five hundred and twenty-four dollars. After judgment they appealed to this court.

The only questions that have been raised upon the record, are whether the appellants can maintain this action, and whether the appellee, Stemmons, being the defendant in execution, is not estopped from setting up the defense that he had no vendible interest in the property in controversy, or at least none such as was subject to sale under an execution.

It was a principle of the common law, steadily maintained, that an equitable interest in chattels could not be sold under execution. A sheriff must actually seize the property on a *fi. fa.* before he can sell. (a) This was a requirement of the common law, and it has been sanctioned by our statute. The great sacrifice resulting from the sale of such *interests, has [* 446] caused their prohibition. The interest of the debtor may be great or small, and as it is uncertain what will be realized by the purchase, there is almost invariably a ruinous sale. This very case demonstrates the impolicy of such transactions. Here is a sale of an interest in property for two dollars, and that property not having been delivered by the sheriff, has given rise to this vexatious and protracted litigation. Such will always be the case when there is a departure from first principles. Our statute expressly subjects equitable interests in land to sale; (b) but not

(a) *Sexton v. Monks*, 16 Mo. 156; *Boyce v. Smith*, *id.* 317; *Newman v. Hook*, 37 Mo. 207; *Foster v. Potter*, *id.* 529.

(b) See *McIlvaine v. Smith*, 42 Mo. 45.

equitable chattel interests. At law, after forfeiture, the mortgagor has no interest in the chattels mortgaged. The right of redemption is a mere chose in action; not the subject of the levy and sale upon execution. The interest of the mortgagor, if definite and determinate, however limited, may be sold under execution; but a mere holding at the will of the mortgagee is not the subject of a sale. It does not comport with the dignity of the law, that such evanescent interests should be the subject of sale. It is unwarrantable interference with the rights of others. A levy by a sheriff on a slave, might frequently cause his escape. Why should the law suffer the property of a man to be sold on an execution against another? Such interference must prove injurious to the rights of the true owners. The creditor is not without his redress; he may, by suitable proceedings, ascertain the precise interest his debtor has in property, and then subject it to sale when there can be no sacrifice.

The authorities cited do not warrant the inference that a debtor is estopped from availing himself of the want of property in the subject of sale, in an action against himself by the purchaser at such sale. The rule prohibiting a sale of the equity of redemption under execution, is designed to protect the property of the debtor from sacrifice; to prevent gambling about uncertainties, and such being its aim, there is a propriety in suffering the debtor to avail himself of this defense.

The damages assessed against the plaintiff, were for the use of the property. The jury have found that they have been benefitted so much by the use of the property, which they wrongfully took from the defendant. It has been ascertained that they were not entitled to the property; its value to them is deemed to be worth so much, there is then no injustice in making them pay the amount they have been benefitted by its employment. Where would be the justice in permitting them, for the sum of two dollars, to hold on to the damages assessed by the jury.

The other Judges concurring, the judgment will be affirmed.

THE STATE, appellant, v. HADEN, respondent.

15 Mo. 447.

Criminal Law—Indictment.—An indictment charging the sale of one quart of whisky, and suffering the same to be drank at the place of sale without a grocer's, dramshop-keeper's or inn-keeper's license, is bad. The negation is not broad enough. A tavern license ought to have been negatived.

Appeal from Greene Circuit Court.

GARDENHIRE, Attorney General, for the State.

HENDRICK, *contra*.

RYLAND, J., delivered the opinion of the court.

The defendant, Joseph D. Haden, was indicted for selling a quart of whisky and suffering it to be drank at the place of sale without license.

He appeared to the indictment and moved the court to quash it. The court sustained his motion; quashed the indictment, to which ruling of the court the State excepted and tendered her bill of exceptions and brings the case to this court by appeal.

In looking into the indictment, I find that the defendant is charged with selling one "quart of whisky to John A. Gibson, of the value of twenty cents, and suffered the same to be drank at the place of sale, without then and there having grocer's, dramshop-keeper's or inn-keeper's license authorizing said sale."

This indictment is bad. The negation of license is not broad enough. The defendant might well have sold the quart of whisky and suffered it to be drank at the place of sale, without either one of the licenses *mentioned, and yet have [* 448] not violated the law. He might have had a tavern license.

Our law contemplates the grant of a tavern license, separate and distinct from an inn-keeper's license. See Session Acts of 1849, page 56. The rate of taxation is greater on one than on the other. The tavern license for one year cannot be less than twenty dollars. The inn-keeper's license ten dollars for the same

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period. No matter how intimately and closely connected with each other these occupations may be, and how "like the same" they are in their design and effect, yet our legislature has seen fit to separate and distinguish them, so far as license is concerned.

This indictment was therefore properly quashed by the court below, and the other Judges concurring, the judgment is affirmed. (a)

WALL'S Guardian, defendant in error, v. COPPEDGE, plaintiff in error.

15 Mo. 448.

1. *Dower*.—A case within the provisions of section 2, of the act concerning dower, Rev. Stat. of 1835. (b)
2. *Evidence—Admission*.—In a controversy between the heirs and one who has married the widow of a deceased person, in reference to his property, the declarations of the widow are not admissible.

Error to Ray Circuit Court.

STATEMENT OF THE CASE.

Defendants in error, by their guardian, brought an action of detinue against plaintiff in error for the recovery of certain slaves. On the statutory plea the cause was tried at the June term, 1850.

On the trial, defendants in error, plaintiff below, introduced a witness, George, who testified as to the value of the slaves—that they were in possession of defendants before and at the institution of this suit—that before suit plaintiffs demanded them and defendants refused to give them up. That J. R. Wall died before the suit was brought and that plaintiffs were his only children.

Another witness who proved that John R. Wall died seized of said slaves as his own property, and also their value. That Janette Coppedge was the widow of said Wall and plaintiffs were his children.

(a) *State v. Hornbeak*, *post.* p. 478; *State v. Wishon*, *post.* p. 503; *State v. Owens*, *post.* p. 506; *State v. Williamson*, 19 Mo. 384; *State v. Sutton*, 5 Mo. 300; *State v. Runyan*, 26 Mo. 167; *State v. Andrews*, *id.* 169; *State v. Gregory*, 27 Mo. 231. But see *State v. Cox*, 29 Mo. 475.

(b) Gen'l Stat. of 1865, chap. 130, § 4; *Wagner's Stat.*, p. 539.

The will of John R. Wall was then read in evidence. The [449] will devised the use of all his real and personal estate to his wife, Janette, so long as she should remain a widow, or until his son, Octavius, should arrive at twenty-one years of age and then as follows: "At which time I wish all my personal estate to be equally divided among my widow, my son Octavius and my daughter Ella, saving to my widow her dower."

Plaintiffs then read in evidence an order of the county court of Ray county for partition of the slaves and the proceedings under that order. Plaintiffs then gave in evidence the declarations of Janette Wall before and after her marriage with defendant to show that she had intended to take and had taken only a life estate in the slaves in suit. Parts of depositions, to prove the same facts and the death of Janette Wall, were then read in evidence by plaintiffs. Evidence of the acts and declarations of Mrs. Wall, at the time the commissioners made partition, was also given. Exceptions were taken to the admission of the evidence of the declaration of Mrs. Wall and to the reading of the depositions.

HAYDEN, for plaintiff in error.

LEWIS, ABELL & STRINGFELLOW, *contra*.

RYLAND, J., delivered the opinion of the court. [* 451]

From the above statement it will be seen, that the main question in this case arises on the will of Jno. R. Wall, the father of the defendants in error who were plaintiffs below.

The plaintiff in error, the defendant below, claims the slaves sued for in right of his late wife Janette Coppedge, who had been the wife of said Jno. R. Wall. Her right was derived under the following clause of the will of her former husband, Wall, namely: "I desire that my wife Janette, shall have the use and benefit of all my estate, both real and personal, so long as she shall remain my widow, or until my son Octavius Wall, shall arrive at the age of twenty-one years, at which time, I wish my personal estate to be equally divided among my widow, my son Octavius and my daughter Ella, saving to my widow her dower." Under this will it appears, that Janette Wall took possession of the property, real and personal, and used it up to the time of her marriage with the plaintiff in error. After her marriage, under proceedings in the county court of Ray county, partition of the slaves and other personal property was had between Janette and the two children

(the plaintiffs below). The slaves in suit were allotted and partitioned to Janette, then the wife of the plaintiff in error, and the slaves have been in his possession up to the bringing of this action. Janette Coppedge died before the suit was brought.

What estate did Mrs. Janette Coppedge take in these negroes under the will of her former husband?

It is the opinion of this court, that under the will, [* 452] Mrs. Janette Wall *was entitled to the slaves absolutely, as soon as they were allotted to her as her equal part thereof.

But if there were any doubt as to the estate which she derived, under the will, to these negroes, there can be none under the statute of this State, then in force concerning dower. The will was dated 7th December, 1843, and the record shows it was recorded the 6th February, 1844; between these dates then, John R. Wall died. The Rev. statutes of 1835 were then in force and the act concerning dower governs this case. By the second section of that act, the widow of a husband dying, leaving a child or children, became entitled absolutely to a share in the slaves and other personal property belonging to the husband at the time of his death, equal to the share of a child of such deceased husband, after the payment of debts. Dower act 1835, sec. 2. "Where the husband shall die, leaving a child or children, or other descendents, the widow shall be entitled absolutely, to a share in the slaves, and other personal estate belonging to the husband at the time of his death, equal to the share of a child of such deceased husband after the payment of debts."

Here the husband died leaving two children only, and the widow became entitled to one-third part of the slaves and other personal estate after debts were paid. She and the two children were entitled to the whole, each to one-third, and this absolutely.

So it is plain, that either under the will, or under the law, she was entitled to a third part, there being but two children, absolutely.

All that was said about election, or making choice of an estate for life, has nothing to do with the partition in this case. Her dower or her share was allotted to her, under this statute, and

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that share became her own in the negroes absolutely. This settles the case, and will settle it finally between these parties.

The plaintiffs below have no right, either under the will, or under the statute, the share of the slaves allotted to their mother. These were her own absolute property, and, as such, became the property, upon her marriage, of her husband, Coppedge, he having them in his possession from and after the marriage.

It will not be necessary to notice the admission, as evidence of Mrs. Janette Coppedge's declaration further than to say, they were not competent evidence and should have been excluded.(a)

The other Judges concurring, the judgment below must be reversed.

DENNIS, plaintiff in error, v. ASHLY's Administrators, defendants in error.

15 Mo. 453.

Agent—implied powers—An authority to sell a slave includes and implies a power to warrant the slave to be sound.

Error to Andrew Circuit Court.

VORIES, for plaintiff in error.

WILLIAMS, *contra*.

RYLAND, J., delivered the opinion of the court. [456]

The question in this case, as will be seen by the above statement, involves the authority of the agent to bind his principal by a warranty of soundness in the sale of a personal chattel. The instructions refused on the part of the plaintiff, and those given for the defendants in the court below, all rest upon this

(a) But the declarations of a party in possession of property against his interest are admissible in evidence against one claiming under him; *Cavin v. Smith*, 21 Mo. 444; *Criddle v. Criddle*, *id.* 522; if made prior to the inception of the successor's title; *Cavin v. Smith*, 24 Mo. 221.

authority. It is a branch of the law on which many adjudications have been made, and which has also employed the labor and learning of elementary writers. The decisions are not uniform; and distinctions have been taken which are not supported in reason, and are destitute of the force of enlightened authority. However, some general rule may be gathered from the decisions which will be of importance in settling the question so far as it relates to this case.

"In all cases an authority is to be construed, and the intention of the principal to be ascertained, in reference to the purpose of the appointment; and a consideration of the object which the agent is directed to accomplish will either expand the powers specified, as means of executing it, or limit the exercise of the most general powers conferred. Accordingly, it is a general maxim, applicable to special and limited agencies, as well as to those which are more comprehensive and discretionary, that in the absence of special instructions to the contrary, and in the absence of such prescription of the manner of doing the act as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual legal and appropriate measures proper to perform it," or as it has been expressed, the "principal authority includes all mediate powers which are necessary to carry it into effect:" Peck and another v. Harriott and another; 6 Serg. and Rawle, 146, 151; 1 American Leading cases, 394.

"The amount of this rule is, that a direction or authority to do a thing is a reasonable implication of the powers necessary to accomplish it, unless there is a special restriction, or unless an intention to the contrary is to be inferred from other parts of the authority."

[* 457] *Upon this principle it has been decided that a special agency to sell chattels, or to procure subscribers to a joint stock company relating to lands, implies (unless forbidden) an authority to bind the principal by a warranty or representations respecting the quality or condition of the subject of the contract, such being usual means of accomplishing the proposed end: San-

ford v. Handy, 23 Wend. 260; Nelson v. Cowing, 6 Hill, 337; and that an authority to sell a slave includes and implies a power to warrant the slave to be sound: Skinner v. Gunn, 9 Porter, 305; Gaines v. McKinley, 1 Judge's Alabama Rep. 446. An authority to sell and convey lands will authorize the execution of deeds with general warranty binding the principal, if there be no restriction in the power: Peters v. Farnsworth, 15 Vermont, 155; Taggart v. Stanberry, 2 McLean, 543, 549; Vanada's heirs v. Hopkins' adm'r, 1 J. J. Marshall, 285. These cases are against the authority of Mixon v. Hyserott, 5 Johns. 58.

Where a person is engaged in a particular department of business, and is employed to do an act within his line, *with special restrictions*, there the general powers, derivable from the nature of his ordinary employment, will control the limitation; he will be held to possess such in the *particular instance*, as his ordinary occupation fairly imports to the public: Nickson v. Brohan, 10 Modern, 109.

A general agency is an implied authority, derived from a course of dealing or from a number of acts of a particular kind authorized or assented to. Such a general authority authorizes the agent to bind the principal without orders, in dealing with those who have no notice of the want of lawful power in the agent, and who act without collusion: See St. John v. Redmond, 9 Porter, 428; Stot-hard v. Aull & Morehead, 7 Mo. Rep. 318; Williams *et al.* v. Mitchell, 7 Mass. 98. In the case of the Commercial Bank of Lake Erie v. Norton, 1 Hill, 502, the court said: "It is not necessary, in order to constitute a general agent, that he should have done before an act the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principals, that is enough. But beyond the regular course of his business employment, and the general nature of the acts done, the implied power of a general agent will not extend."

Bronson, Justice, in the case of Nelson v. Cowing, 6 Hill, 338, said: "But a warranty, and so of a representation, is one of the usual means for effecting a sale of a chattel; and when the owner sells by an agent, it may be presumed, in the absence of

all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end."

[* 458] *Mr. Justice Story, in his treatise on agency, page 126, lays down the general rule which is as applicable to special as well as to general agents, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter, will also bind him, if made at the same time and constitute a part of the *res gestæ*." "For most purposes, a party dealing with an agent, who is acting within the scope of his authority and employment, is to be considered as dealing with the principal himself."

In the case of *Skinner v. C. & R. Gunn*, 9 Alabama, 306, Ormond, Justice, said: "The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is an usual and ordinary stipulation in such contracts, and must therefore be implied to effectuate the object of the power: *Fenn v. Harrison*, 3 Term Rep. 757; *Alexander v. Gibson*, 2 Campbell, 555.

Now, by applying the principles here laid down, and they are mainly expressed in the words of adjudicated cases, to the case before us, and it will be plainly seen that the court below erred in refusing the instructions containing the above principles, which were asked for by the plaintiff below—erred also in giving the converse of these instructions to the jury on the part of the defendants.

Here, the intestate Ashley, in his life time, put a negro woman in the possession of one Curl, who was engaged in the business of buying and selling negroes. That was his ordinary employment; the negro woman was put there by her owner to be sold for him and on his account. There was nothing said about warranting her soundness or anything else; no inhibition to warrant—no restriction upon the terms of the sale.

The agent, Curl, sold the negro woman to the plaintiff, and warranted her soundness, after trying to sell her without such warranty; and finding that the plaintiff would not purchase without

a warranty of soundness, he sold her and warranted her to be sound.

This act was one of the usual and ordinary means used in sales of such property; few persons are found willing even to purchase slaves without such a warrant. In the language of Justice Bronson, "a warranty of soundness is one of the usual means of effecting a sale" of such a species of property.

The agent, Curl, therefore, was acting fully within the line of his usual employment in selling and giving a warranty of the slave, as to her soundness in this instance, and his acts are binding on his principal.

The judgment below must, therefore, be reversed, and this cause *remanded to be proceeded in further, [* 459] in accordance with this opinion, the other Judges concurring.

ROBINSON'S Ex'rs, plaintiffs in error, v. ROBARDS, defendant in error.

15 Mo. 459.

1. *Fraudulent conveyance*.—*Void as a matter of law*.—If a conveyance on the face of it appears to be for the use of the person making it, the court will, as a matter of law, declare it to be void as against creditors.
2. So, too, if there is a conveyance of chattels for a consideration not deemed valuable in law which is not accompanied by possession nor recorded.
3. *Conveyance to use of grantor*.—A conveyance in consideration that the grantee would support the grantor and his family, is a conveyance to the use of the grantor.
4. *Fraud—price*.—In determining the question of fraud, inadequacy of price is a circumstance of great weight.

Error to Boone Circuit Court.

GORDON, for plaintiffs in error.

HAYDEN, *contra*.

*SCOTT, J., delivered the opinion of the court.

[* 461]

This was a bill in chancery, filed by the complainants against the defendants, charging substantially, that Wm. Robards, one of the defendants, in December, 1847, was indebted to the complainants in a large sum of money, for which, afterwards, on the 25th August, 1848, a judgment for the sum of \$4493 was rendered, on which a special *fi. fa.* was issued, directing the sale of the lands in the execution mentioned; and if the said lands should be insufficient to satisfy the said execution, then of the remaining lands and tenements, goods and chattels, belonging to the said Robards, to satisfy the same; that in March, 1849, the sum \$1289.65 was made on said execution: that at the time of the rendition of the said judgment, the said W. Robards was largely indebted, and fraudulently conveyed to his two sons, Wm. A. Robards and John M. Robards, and other persons, all his slaves, ten or twelve in number, and all of his other personal property, consisting of horses, cattle, hogs, farming utensils, &c.: that the said William Robards, at the time of the rendition of the said judgment, fraudulently and without consideration, conveyed to John M. Robards, three slaves, Sharper, Martin, and Nathan, together with a large amount of other personal property, consisting of horses, cattle, and other stock, household and kitchen furniture, farming utensils, &c.: that the said conveyance was made to the said John Robards at a time when he was fully aware of his father's indebtedness; was without consideration, and made with intent to defraud the complainants.

The answer of Jno. M. Robards, one of the defendants, admits the indebtedness of W. Robards to the complainants for land sold, and the judgment, execution and sale of said land for the payment of the purchase money as stated in the bill; that he left Boone county in June, 1846, and was absent twelve months, and never understood how matters were between his father and the complainants; that in the fall of 1847, his father being [*462] in bad health and unable to carry on any business, *agreed to give him what stock and farming utensils then were upon the farm, in consideration that he would support the said Robards, his father, and his wife; that he accepted the agreement and took the property accordingly, together with the use of

the slaves and farm ; that there was but a small stock and few farming utensils ; that in 1841, his father gave him a small negro boy named Nathan, having previously given to each of his other children one or more slaves ; that ever since the gift of said slave, he has had possession of him and exerted control over him ; that in September, 1848, he purchased of his father two slaves, Sharper and Martin, for the sum of \$650, which was paid down ; that he purchased the said slaves fairly, although he knew at the time of the judgment of the complainants against his father, but he believed the land would be amply sufficient to satisfy it.

The answer of Wm. Robards admitted his indebtedness to the complainants, and the judgment, execution and sale of his land to pay the debt ; that he believed the land amply sufficient to pay the debt due the complainants, as they had taken it as a security for a much larger sum which had been reduced by payments ; that one of the complainants used means to prevent a fair sale of the land, and they conspired to cause a sacrifice of it ; that at the time of the rendition of the payment, he owned ten slaves, not valuable, being mostly children, and a few ordinary articles of household furniture ; that in the fall of the year 1847, in consequence of ill health, he gave all his stock and farming utensils to his son John, in consideration he would take charge of the farm, and support him and his family. The stock thus conveyed was inconsiderable. His son accepted the conveyance, and supported him and his family until the spring of 1849. That in consequence of his inability to establish payments made by him to the complainants, their recovery at law was twice as large as it should have been ; that in the year 1841, he gave a slave to each of his sons ; that the slave given to his son John was named Nathan, and that he has never had any control over or claim to him since that time ; that he was not then embarrassed nor ever expected to be ; that on or about the 5th September, 1848, he executed to Wm. A. Robards a bill of sale for eight slaves, a man and his wife and six of their children, and also a bill of sale to his son John for a boy Martin and a man Sharper ; that he was indebted to his son William in the sum of \$600, which he was unable to pay without a sale of a portion of his slaves, and being

unwilling to separate a family, he induced his son William to take it and pay him the balance in money; that William took the slaves on condition that he would take in part payment a bond on H. C. Myers for \$400; that the man slave he sold to [* 463] *his son John was of little value, being badly ruptured; that all of the slaves were of but little value for present use, and at the time of sale he was firmly persuaded that the land would pay the complainants' debt; that the sale of his slaves was induced by his old age and their expensiveness to him, and with no intent to hinder, delay or defraud his creditors; that with the proceeds of the sale of the said slaves, he has paid all his other debts; that William paid fourteen hundred dollars for the slaves purchased, which was their fair value; that the sale to John was *bona fide*, and he actually received the purchase money. He alleges that he had a claim against the estate of the complainants' testator, growing out of a misrepresentation or breach of warranty on the sale of the land; that he owns land in Kentucky and is not insolvent.

Replications were filed to these answers, and three issues, involving the validity of the three several transactions between William and John Robards, were directed by the court to be made.

First. As to the gift of the child Nathan.

Second. As to the conveyance of the stock, etc.

Third. As to the sale of the slaves, Martin and Sharper.

Evidence was given on both sides in favor of their respective views of the subject, and on the trial the court gave the following instructions to the jury, at the instance of the complainants:

1. "If the jury believe from the evidence that the several conveyances of the slaves and other personal property, mentioned in the evidence, from William Robards, the father, to John Robards, his son, were concocted or contrived between them for the purpose of hindering, delaying or defrauding the plaintiffs in the collection of their debts on William Robards, then the verdict of the jury should be for the plaintiffs."

2. "That plaintiffs, in this case, are not bound to make positive proof of fraud, but the jury may take into consideration all the facts and circumstances in order to find their verdict."

3. "That in order to constitute the gift of the slave, Nathan, by William Robards to John Robards, valid, the jury must be satisfied from the evidence, that the possession of said slave was delivered to the said John Robards at the time of the gift, or that said gift was evidenced by deed in writing and acknowledged or proved and recorded within six months after the date of said deed."

4. Although fraud is not to be presumed, yet it may be proved from circumstances; and, in determining that question, the jury may take into consideration all the facts and circumstances detailed in evidence."

5. "If the jury find from the evidence that the several conveyances of the slaves and other personal property spoken of in evidence, from *Wm. Robards to John Robards were contrived between them with intent to hinder, delay or defraud the creditors of the said William Robards, then the jury should find for the plaintiffs, notwithstanding the said John Robards may have paid the full value of the property purchased."

6. "That although a debtor has a right, in the payment of his debts, to prefer one creditor to another, that preference must be an honest one, and if the jury find from the evidence, that at the time of such transfer of any of the property, plaintiffs were the creditors of William Robards, and that such transfer was made with intent on the part of William Robards to hinder, delay or defraud the plaintiffs in the collection of their debt, and that John participated in said fraud, then the jury ought to find for plaintiffs as to such transfer, although they may believe from the evidence that John paid the full value for the property thus transferred."

And refused the following instructions asked by the complainants:

1. "That if the conveyance of the horses, cattle, hogs, sheep, household and kitchen furniture and farming utensils, and other property, made by William Robards to John Robards, his son, was not accompanied by an immediate delivery of the possession of said property, and followed by an actual and continued change of

possession, then the said conveyance is presumed to be fraudulent as against the plaintiffs, provided the jury shall find that the plaintiffs were creditors, at the time, of the said William Robards."

2. "If the jury believe from the evidence, that William Robards, the father, conveyed all his personal property, consisting of horses, cattle, sheep, household and kitchen furniture, farming utensils and other articles, to his son, John Robards, in consideration that the said John was to support him and his family, and that, at the time of making said conveyance, the plaintiffs were creditors of the said William Robards, the said conveyance is fraudulent, and as to that issue the jury ought to find for the plaintiffs."

3. "If the jury find from the evidence, that William Robards, the father, conveyed all his personal property, except his slaves, to his son, John, for and in consideration that his said son, John, agreed to support him and his family, and that at the time of such conveyance the plaintiffs were creditors of the said William, then said conveyance is a conveyance of goods and chattels in trust to the use of the said William Robards, within the meaning of the statute of this State, and fraudulent as against the plaintiffs."

4. "If the jury believe from the evidence that at the [* 465] time William Robards *gave the slave, Nathan, to John Robards, he, William, was largely indebted to plaintiffs or their intestate, and that said Nathan remained in the possession of said William Robards, that then such gift is presumed to be fraudulent as against these plaintiffs."

5. "If the jury believe from the evidence, that the pretended conveyance of Sharper and Martin, from William Robards to John Robards, was made at a time when William Robards was largely in debt, and about the time a judgment was rendered against him of which John had knowledge, and that John Robards was his son, and at the time residing with him, and that no other personal property was retained by William Robards; these are circumstances from which the jury may infer the existence of fraud in the transaction."

And gave the following instructions, asked by the defendant :

1. "That although the jury may find from the evidence that Wm. Robards was indebted at the time he gave the slave Nathan to his son John, yet the mere fact of such indebtment does not of itself constitute or make the gift fraudulent and void ; but the question whether the same be fraudulent or not is to be ascertained, not from the mere fact of the indebtment at the time of the gift, but from all the circumstances of the case."

2. "That if the jury find from the evidence, that Wm. Robards, in the fall of 1847, transferred to his son John the horses and cattle, farming utensils and other property of which he was possessed, with the use of the farm, for a valuable consideration as testified to by the witness William A. Robards, and that the transfer of the property so made was *bona fide*, and not made with an intent to delay, hinder, defraud or prevent the creditors of the said William Robards from the collection of their lawful debts or demands, that then the jury ought to find the second issue for the defendant."

3. "To constitute the consideration for the property, &c., mentioned above in the last instruction, a valuable consideration, it is not necessary that the same should have been equal in value to the amount of the property, &c., transferred, &c., by the said William to the said John ; nor is it necessary that the same should have been paid or rendered by the said John to the said William in money, but it is only necessary that the jury should be satisfied from the evidence that the same was paid or rendered in other valuable things, or in the services of him, the said John, at the request of the said William."

4. "That if the jury find from the evidence, that the said slaves Sharper and Martin were sold by the said William Robards to the said John Robards for the sum of six hundred and fifty dollars, and that the same *was made *bona fide*, and [* 466] not with an intention on the part of the said William Robards to delay, hinder or defraud the creditors of the said William Robards in the collection of their lawful debts or demands against him, then the jury ought to find the third issue for the defendant."

5. "That even though the jury may find that the said William Robards made the sale of slaves, Sharper and Martin, to the said John Robards with an intent to defraud, delay or hinder the creditors of the said William Robards from the collection of their lawful demands against him, yet the jury are bound to find their verdict for him, the said John, upon said issue, if they find from the evidence that he purchased and paid the price of \$650 for those negroes *bona fide*, without notice or knowledge of the said unlawful intent of him, the said William.

6. "That fraud is not to be presumed, but the law requires the party who alleges or charges another with it to prove the same to the satisfaction of the jury.

7. "That, notwithstanding the plaintiffs had recovered the judgment of the Boone circuit court for their debt, &c., against the said William Robards, as shown by the record thereof, as read in evidence by the plaintiffs, yet the said William Robards had a legal right to sell his slaves Sharper and Martin, to obtain means to pay the claims of other creditors against him.

8. "That it does not devolve upon the defendant in this case to prove to the jury that the transfer of the household goods, and other property, by the said William to the said John was not made to defraud, hinder or delay the creditors of the said William from the collection of their lawful debts, damages and demands, but it devolves upon the plaintiffs to prove the same, or that the same should appear to the satisfaction of the jury from the facts and circumstances of the case given in evidence."

The jury found the issues for the defendants, and thereupon the court dismissed the complainants' bill, on which decree this writ of error is sued out.

The first two of the issues in this case involved the construction of the 1st and the 4th sections of the act concerning fraudulent conveyances.(a) Without reviewing all the instructions given and refused, it is manifest that the law has not been put to the jury in a manner to obtain a correct verdict. The first and fourth sections of the act referred to make certain conveyances void, not

(a) Gen'l Stat. of 1864, chap. 107, §§ 1, 4; Wagner's Stat. pp. 279-80.

fraudulent, but "void." In relation to these, when the acts appear which the law declares shall make a conveyance void, it is deemed to be the duty of the court to declare the enactment of the law to the jury. The sections referred to will be *construed like any other statute declaring a transaction [* 467] void. If a conveyance, on the face of it, appears to be for the use of the person making it, as a matter of law the court will declare it void against creditors, just as it would declare a bond conditioned to murder a man or do any other unlawful act. (a) So when it appears that there is a conveyance of chattels or slaves for a consideration not deemed valuable in law, and possession does not really and *bona fide* accompany such conveyance, and it is not properly recorded, it is the duty of the court to declare to the jury that such conveyance is void against creditors and purchasers. The conveyance whose validity was involved in the second issue, was certainly for the use of the grantor and was void, unless it can be maintained that a debtor may lawfully convey all his property for the future support of himself and family, to the prejudice of his creditors.

From this review of the first and fourth sections of the statute it is not to be inferred that they alone are applicable to the transactions involved in this controversy, but the other provisions of law which submit the question of fraudulent intent to the jury are not to be overlooked. If the third instruction, given at the instance of the defendant, intended to convey the idea that a valuable consideration, as contradistinguished from one that is both valuable and adequate, is sufficient under the statute, it cannot be sustained; for, in all cases of conveyances affecting creditors or purchasers, the inadequacy of price is a circumstance of great weight against their validity.

The first three instructions given for the defendants contained the views above expressed relative to the construction of the statute, and were erroneous. The substitution of the word fraudu-

(a) Brooks v. Wimer, 20 Mo. 503; Zeigler v. Maddox, 26 Mo. 575; Stanley v. Bunce, 27 Mo. 269; Johnson v. McAllister, 30 Mo. 327.

But not if founded on a valuable consideration; Eaton v. Perry, 29 Mo. 96.

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lent for the word void, used by the statute, might have warranted a rejection of some of the instructions of the complainants, though it seems a very nice exception, and the only wonder is, that when the statute law is before the parties, they will not adopt its language instead of their own.

The other Judges concurring, the decree will be reversed and the case remanded. (a)

DAVIS' Administrator, appellee, v. SMITH & BRADLEY, appellants.

15 Mo. 467.

1. *Contract—Duty created by law and by act of party*—When the law creates a duty, and the party is prevented from performing it, without any default in him, and he has no remedy over, the law will excuse him. But when the party, by his own contract, creates a charge or duty upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it, by his contract.

[* 468] *2. *Landlord and tenant—Rent*.—The lessees of a mill are bound to pay the rent, notwithstanding the main posts of the building, supporting all the machinery, were decayed, in consequence of which the building fell and destroyed all the machinery. The defect in the posts was an infirmity to which all timbers are subject, and their liability to such a defect was equally in the knowledge of both parties.

Appeal from Lafayette Circuit Court.

LEONARD, for appellants.

HAYDEN, *contra*.

[* 469] *SCOTT, J., delivered the opinion of the court.

This was an action begun by the appellee, Davis' administrator, against the appellants on a sealed instrument of the 18th April, 1848, by which Davis, the appellee, leased to the appellants until the 25th December, 1848, a grist and saw mill and carding ma-

(a) See *passim*, Potter v. McDowell, 31 Mo. 62; State v. Benoist, 37 Mo. 500; Bigelow v. Stringer, 40 Mo. 195.

chine, situated on Blackwater, in Johnson county, for \$225, payable at the expiration of the term. The appellants, the lessees, set up the defense, that at the time the lease was made, the main posts of the building, which supported all the machinery, were damaged and rotten, and the defect was unknown to the lessees and not apparent to ordinary observation; and that in consequence of this defect, the posts gave way shortly after entering under the lease; the building fell and destroyed the machinery. This was communicated to Davis, the lessor, and the appellants, the lessees, abandoned the premises.

These facts appearing on the trial, the court directed in favor of the appellee and there was a verdict and judgment accordingly, and the cause was brought to this court.

The distinction between a duty created by law, and one created by the party is an established principle of our law. When the law creates a duty and the party is disabled to perform it without any default in him and he has no remedy over, the law will excuse him. But when the party, by his own contract, creates a charge or duty upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and therefore, if a lessee covenant to repair a house, though *it be [* 470] thrown down by a tempest or destroyed by enemies, yet he is bound to repair it; and if he covenant to pay rent for a house, though it be burnt down, yet he is liable for the whole rent; Lord. R. 1477.(a) "The entire estate or fee is divided into parcels. The tenant is owner of his term, subject indeed to the payment of rent. The landlord is owner of the reversion. The first has agreed to pay his rent as the consideration for his estate in the premises. The other has paid his money for the entire property. Equality is equity, where the act of God or accident destroys the property, it is a loss which ought to fall on each in proportion to his interest;" Tucker's Com.(b) The analogy attempted to be drawn from the case of a lease of furnished rooms, after proving untenable, and that of contracts for manufactured articles, not answering the

(a) Gibson v. Perry, 29 Mo. 245.

(b) Vol. 1, p. 32.

Wooldridge, Adm'r, v. Draper, Adm'r. 15 Mo.

purpose for which they were bought, in which it was held, in the one case, that the rooms might be abandoned, and, in the other, that the articles might be returned, cannot help this case. That furnished rooms, let for a particular purpose, should answer the object in renting them is not unreasonable. Here it is not pretended that the mills did not answer the ends for which they were leased. There was no warranty of the soundness of the materials with which the house was built, and there is no pretense of any misrepresentation or concealment on the part of the lessor. The defect in the posts was an infirmity to which all timbers are subject, and their liability to such defect was equally in the knowledge of both parties. No one, in leasing his house, is understood to warrant, by implication, that the materials of which it is composed are sound. In a sale of a limited interest in any chattel, there is no implied warranty of soundness on the part of the vendor.

The other Judges concurring, the judgment will be affirmed.

WOOLDRIDGE, adm'r of McDonald, appellant, v. DRAPER, adm'r of McDonald, respondent.

15 Mo. 470.

1. *Costs—Action by administrator.*—Where the cause of action accrued to the testator or intestate, in his lifetime, there, the administrator or executor, suing and failing to recover, is not liable for costs *de bonis propriis*; the judgment for costs will be *de bonis testatoris*; but where the cause of action accrues to the executor or administrator, and he sues and fails to recover, he shall pay costs himself.

Appeal from Johnson Circuit Court.

HAYDEN, for appellant.

[* 472] *HICKS, *contra*.

RYLAND, J., delivered the opinion of the court.

The question as to the liability of the administrator, Wooldridge, for the costs of the suit below, is the only one for the con-

sideration of this court. The general rule of law upon this subject is, that where the cause of action accrued to the testator or intestate in his lifetime, there the executor or administrator suing and failing to recover, is not liable for costs *de bonis propriis*; the judgment for costs will be *de bonis testatoris*. In suits brought by an executor or administrator upon contracts made with the testator or intestate in his lifetime, the same rule prevails.

But where the cause of action accrues to the administrator or to the executor and he sues and fails to recover, he shall pay costs himself. The powers and duties and rights of an administrator or executor relate back to the death of the intestate or testator. All causes of action accruing after the death and before letters testamentary or of administration have been taken out, are nevertheless causes of action accruing to the executor or administrator; and in such, if he fail to obtain judgment, the defendant is entitled to judgment for costs against him in his personal character.

In the case of *Goldthwayte and Wife v. Petrie*, 5 Term. Rep. 234,5; Lord Kenyon, Chief Justice, delivered the opinion of the court, after stating the case. "In general, it is an established rule (said his Lordship) that where an action is brought by an executor, as executor, for transactions arising in lifetime of the testator, he is not liable to pay costs though he fail in the action. But in this case (he continued), it was not necessary to name the wife as executrix; she might have brought the action in her own right, for it is stated in both counts that the money was received and the promises made by the defendant *after the testator's death. We have looked into the [* 473] authorities, which we find have settled his point and which decide that the plaintiffs in this case are liable to pay costs." In the case of *Tattersall v. Groote*, 2 Bos. & Pull.(a) Lord Eldon Ch. J., said, "after looking into all the cases, we are of opinion, that if the cause of action arose in the time of the administratrix, and if it was not absolutely necessary for her to sue in her character of administratrix, she will be liable to costs.

(a) Page 255.

Some cases are to be found in which the simple fact, that the cause of action has arisen subsequent to the death of the testator or intestate, has been held sufficient to subject the executor or administrator to costs. But on a review of the cases, we think that the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate." In *Bigland v. Robinson*, 3 Salkeld, 105, it is laid down that wherever an executor or administrator must sue as such, as for instance, where he brings debt on bond due to his testator, he shall not pay costs. In *Nicholas v. Killebrew*, 1 Lord Raym. 437, it was agreed that it is not to any purpose for a plaintiff to name himself executor where he ought not so to do, but that if he ground his action upon the same contract, that was to the testator, he shall not pay costs, if he fail in the suit.

In *Ketchum's Executor v. Ketchum*, 4 Cowen, 87, the court stated the rule to be, that where an executor or administrator unnecessarily sues in his representative character; that is, where he might have brought the action in his own name, if he is nonsuited or there be a verdict against him, he shall pay costs (5 Term Rep. 234-5). The mere change of the form of the action shall not protect him.

The court in this case, refers to many decisions upon this subject and makes a distinction between an entire and a partial cause of action arising after the testator's death. "And there is reason in such distinction (says the court). In the former case, the executor knows, or ought to know, the merits of the cause, and should be holden to sue upon the peril of costs. In the latter case he cannot understand the whole subject; and therefore the law holds him to no more than his own expenses."

It is not thought necessary to mention other authorities on this subject, as the law is generally understood as laid down by those already quoted. In Massachusetts, the executor and administrator suing and failing to recover is liable to pay costs in all cases and then he may apply to the probate court to have the

costs allowed to him, provided such court be *made [*474] satisfied that the facts are such as will authorize the allowance thereof against the estate of which he is such executor or administrator.

The cases of Frogg's executors v. Long's adm'r, 3 Dana 157-8; Hughes' adm'r *et al.* v. Standeford's adm'r's, 3 Dana, 287; and Peyton's adm'r's v. McDowell and Kenny (a) are all upon contracts and transactions had with the intestates in their lifetime, and are within the views above set forth in this opinion. The case of Maupin and Wife v. Goodloe, in 6 Monroe, 410, is not very clearly reported as to the costs. It was a proceeding, however, by Maupin and wife as administrators of James Swaney deceased, and the will of said Swaney came before the court for interpretation. It may therefore be considered as one of the cases included in the above rule of suing on transactions arising in such manner, that they were bound to sue in their fiduciary character.

Now apply the principles and doctrine of the above cases to the one before us, and it will be seen, that the court below did right in giving judgment for costs against the plaintiff *de bonis propriis*.

The plaintiff's petition avers, that his intestate died seized and possessed of the negroes sued for as of her own property. Consequently, he shows that the cause of action, if any, arose after the death and against his right as her administrator. His action is not founded on any contract with his intestate in her lifetime, nor on any injury done or committed to her or her property in her lifetime. It arises entirely after her death, from his own showing in his petition. Without resorting to our statute, or saying how far its general provision, as set forth in the brief of the appellee's counsel in this case, respecting costs, is to operate and control questions of this nature arising on suits by executors and administrators, it is clear that upon the general doctrine the court below decided properly by ordering the costs to be taxed against the plaintiff in his own right. We will not be understood as say-

(a) 3 Dana's Rep., 314.

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ing any thing to bar the plaintiff's right to make application to the probate court for an allowance of such costs as he may have to pay; provided he can satisfy that court that the suit was not wantonly or improperly commenced and prosecuted. This question, as well as the construction of our statute concerning costs in such cases as this, are left open for future consideration.

There is no error in the judgment of the court below, and the other Judges concurring, its judgment is affirmed.

HOLLAND, respondent, v. HUNTON & WHITE, appellants.

15 Mo. 475.

1. *Practice*.—Practice act of 1849 construed.(a)
2. *Actions—Parties*.—The maker and endorser of a promissory note may be jointly sued by the endorsee.

Appeal from Hickory Circuit Court.

WINSTON, for appellants.

WRIGHT, *contra*.

[* 476] *RYLAND, J., delivered the opinion of the court.

The plaintiff brought his civil action in the Hickory circuit court against the defendants, Hunton & White, upon a promissory note signed by Hunton and endorsed by White; the note was originally payable to R. P. Benson and by her assigned to the plaintiff.

The petition avers the liability of White; as the endorser for Hunton.

The clerk of Hickory circuit court issued a summons to the sheriff of Hickory county against White, and to the sheriff of Benton county he issued a summons with a counterpart of the petition and writ against Hunton. The sheriff of Hickory served the summons on White on the first day of March, 1851, by reading it to him;

(a) See Practice act of 1865; Gen'l Stat., Title 34.

and the sheriff of Benton county on the 8th of March, 1851, served the counterpart on Hunton by leaving a copy of the petition and writ at the usual place of his abode with a free white person of the family over the age of fifteen years, in the county of Benton.

The circuit court of Hickory county began its regular term on the 24th day of March, 1851, being more than twenty days after the service upon White, and fifteen days, exclusive of the day of service, upon Hunton. The record and proceedings show that on the third day of the term aforesaid, at which the writs in this case were returnable, judgment by default was rendered herein against the said defendants for want of an answer to the plaintiff's petition. In vacation, the defendant Hunton prayed an appeal and filed his bond with the clerk, and the clerk granted the appeal to him. White did not appeal; nor does he here complain of any error.

The only point necessary for our adjudication arises in this case under the statute concerning "Practice in Courts of Justice," of the session of the legislature in 1848-9.

Under this act, in a petition on a promissory note for the payment of money in which the defendant has been regularly served with notice by leaving a copy at his usual place of abode, fifteen days before the return of the writ, and he fails or neglects to answer, can the court render judgment against him by default? Art. V, sec. 2 of the act, declares, that, "Every defendant served with the summons, fifteen days before the return day thereof, shall be bound to appear at the return term of the writ, and if such summons be served less than fifteen days, he shall be bound to appear at the term next after the return term of the writ." (a) Art. VI, sec. 2: "The only pleading on the part of the defendant is either a demurrer or an answer. It must be filed within six days after the return day of the summons, if the term shall so long continue, *if not, then within such time as [* 477] the court may by rule prescribe." (b)

Art. XII, sec. 2: "If the action be founded on a bond, bill, or

(a) Gen'l Stat. of 1865, chap. 164, § 5; Wagner's Stat. p. 1007.

(b) Gen'l. Stat. of 1865, chap. 165, §§ 4, 5; Wagner's Stat., p. 1014.

note for money, and there be no answer as hereinbefore required, the clerk may, under the direction of the court, enter judgment for the amount which shall appear to be due. In other cases where there is no answer as aforesaid, the plaintiff may, if he require it, have a jury to assess the damages. If no jury be required, the court may assess the damages and render judgment thereon, or give the other relief asked in the petition.(a) Under these provisions, it is obvious that where a party has been summoned fifteen days before the return day of the writ, and he fails to answer, judgment under the direction of the court can be entered up against the defendant in actions on bonds, bills or notes, for money; in other actions, that is, actions not founded on bonds, bills or notes for money, the plaintiff, if he requires it, may have a jury to assess his damages; if no jury be required, the court can assess the damages and render judgment thereon.(b)

But there are actions on bonds, bills and notes in which the plaintiff has a right to have a trial at the return term even if the defendant does answer or demur, unless the court continue the case for good cause.

But in such cases there must be personal service at least twenty days before the return day of the writ.

Art. V, sec. 6: In all cases where the petition is founded solely upon a bond, bill or promissory note for the direct payment of money, and the plaintiff demands a trial at the first term as hereinafter provided, each defendant to authorize such judgment against him, must be personally served at least twenty days before the return day of such writ by *delivering a copy* of such petition to him.

Art. VI, last part of sec. 2: "In cases specified in section 6, of Art. V, the demurrer or answer shall be filed within the first two days after the return day of the summons, and the cause shall be tried at the return term of the summons unless continued for good cause."(c)

Art. XVII, sec. 2: "In cases provided for in sec. 2, Art. VI,

(a) Gen'l Stat. of 1865, chap. 171, § 9; Wagner's Stat. p. 1053.

(b) North v. Nelson, 21 Mo. 370.

(c) Gen'l Stat. of 1865, chap. 165, § 5; Wagner's Stat. p. 1014.

and in cases provided for in Art. XII, and in cases provided for in sec. 4 of Art. XV, the several judgments shall be given at the return term of the summons, unless the court for good cause shall continue the cases."

There can be no doubt from a careful perusal of the statute, that in each case, where the plaintiff's writ has been served fifteen days before the return day thereof, and the defendant shall neglect to answer or demur, the plaintiff is entitled to judgment at the return term—and just as little doubt that he is equally entitled to judgment in actions on bonds, bills or notes for money at the return term of the writ, provided *it has been [* 478] personally delivered to the defendant twenty days before the return day of the writ, if the defendants do answer or demur, unless the court shall continue the case for good cause.

There is no error, then, in this case, in the court below giving judgment at the return term of the writ against the defendant Hunton; he failed to answer, and very properly did the court render judgment against him. There is no pretense of error in the judgment against White.

One other point in this case I may as well notice. It is the joinder in the action of Hunton, the maker and payer of the promissory note, with White, the endorser. Art. III, secs. 6 and 8, put this point to rest:

Sec. 6. Any person may be made a party defendant who has an interest in the controversy adverse to the plaintiff. (a)

Sec. 8. Persons severally liable, including parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action at the option of the plaintiff. Here the payer and endorser are included. I suppose the 8th section was meant for such a case. (b)

Upon the whole case then, there is nothing to reverse, and the other Judges concurring, the judgment below is affirmed.

(a) Gen'l Stat. of 1865, chap. 161, § 5; Wagner's Stat. p. 1000.

(b) Gen'l Stat. of 1865, chap. 161, § 7; Wagner's Stat. p. 1001.

THE STATE, appellant, v. HORNBEAK, respondent.

15 Mo. 478.

Criminal law—Indictment.—An indictment, charging that the defendant did “unlawfully sell one-half pint of brandy, of the value of ten cents, to one William Pryor, and suffered the same to be drank at the place of sale, without then and there having a grocer’s license, dram-shop keeper’s license, an inn-keeper’s license, or any legal authority to sell said brandy, in manner and form as aforesaid,” is good. The negation as to license is broad enough.

Appeal from Greene Circuit Court.

GARDENHIRE, Attorney General, for the State.

[* 479] *HENDRICK, *contra*.

RYLAND, J., delivered the opinion of the court.

The defendant, James F. Hornbeak, was indicted for selling one-half pint of brandy and suffering it to be drank at the place of sale without license.

He appeared to the indictment and moved the court to quash the same, which motion the court sustained; the State excepted to the opinion of the court quashing the indictment, filed her bill of exceptions and brought the case here by appeal.

In looking into the indictment I find that it charges that the defendant, did “unlawfully sell one-half pint of brandy of the value of ten cents to one William Pryor, and suffered the same to be drank at the place of sale, without then and there having a grocer’s license, dramshop-keeper’s license, an inn-keeper’s license, or any legal authority to sell said brandy in manner and form as aforesaid.”

This case differs from the one of the State v. Haden,^(a) just decided by this court. Here the negation as to license is broad enough; it negatives grocer’s, dramshop-keeper’s, inn-keeper’s, or any legal authority to sell. This indictment is substantially good. It is an indictment for selling liquor without license. The part which avers that the liquor was suffered to be drank at the place

(a) *Ante*. p. 447; see references to that case.

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of sale may be stricken out as surplusage. Strike this part out and the indictment will still be good; this averment does not vitiate the allegation of the sale without license. This part being stricken out of the indictment, it then clearly appears that the defendant sold liquor in the county, the time when he sold it, the description of liquor sold, the quantity, the price, the person to whom sold, and the general negation of license and authority to sell.

The indictment then, although very carelessly drawn, being in my opinion sufficiently good to support a judgment, the court below erred *in sustaining the motion to quash. [* 480] Its judgment is therefore reversed, the other Judges concurring, and this cause is remanded to be further proceeded with according to the views of this court herein expressed. (a)

SELF, respondent, v. GARDNER, appellant.

15 Mo. 480.

Slander—Evidence.—In an action of slander, where the words spoken charged the plaintiff with stealing from one person, evidence that he stole from another person is not admissible.

Appeal from Circuit Court of Wright County.

WADDELL, for appellant.

EDWARDS, for respondent.

GAMBLE, J., delivered the opinion of the court.

Gardner brought an action on the case against Self for slanderous words spoken by Self. The defendant pleaded the statutory plea under the act of 1847. The declaration charged the utterance by the defendant of many phrases, imputing to the plaintiff a disposition to steal; but there was only one direct charge of theft made by defendant, and that was that the plaintiff had "stolen a dollar from Lea & Price." On the *trial [* 481]

(a) See *State v. Wishon*, *post.* p. 503; *State v. Owen*, *post.* p. 506.

Stoallings v. Baker & Young. 15 Mo.

the evidence on the part of the plaintiff was confined to the proof of the words spoken by the defendant, charging him with having stolen a dollar from Lea & Price. The defendant offered to read a deposition of one Wm. S. Lea to prove that plaintiff stole a dollar from James A. Bates, but the court on the motion of the plaintiff excluded the deposition. A verdict was rendered for the plaintiff for \$250 ; and the defendant moved for a new trial and in arrest of judgment. Some papers are copied upon the transcript that are in shape of instructions to the jury, but they are not in any bill of exceptions. The motions for a new trial and in arrest of judgment were overruled.

The deposition of Lea was properly excluded. The only charge of actual theft of a dollar was the charge of stealing a dollar from Lea & Price. For making this charge the defendant was sued, and the evidence that plaintiff had stolen a dollar from Bates was not pertinent to the matter in issue, nor could the plaintiff be called on to meet such new charge.

As far as the case is shown by the bill of exceptions the motion for a new trial was properly overruled, and as the declaration contains words clearly actionable, the motion in arrest of judgment was rightly overruled.

The judgment is affirmed.

STOALLINGS, appellant, v. BAKER & YOUNG, respondents.

15 Mo. 481.

Partnership—What constitutes.—An agreement, by which one is to furnish a circular saw mill, and hands and stock to saw, and another is to furnish logs, and feed for the hands and stock, and the lumber to be divided equally between them, does not constitute a partnership.

Appeal from Daviess Circuit Court.

LEWIS, ABELL & STRINGFELLOW, for appellant.

[*482] *RYLAND, J., delivered the opinion of the court.

This was a suit by Stoallings v. Baker & Young, before a jus-

tice of the peace, for money arising on the sale of plank by defendants, which belonged to the plaintiff.

The case was taken to the circuit court, by appeal. On the trial in that court the plaintiff was nonsuited. The facts of the case were, that a contract had been entered into between the plaintiff and the defendants, by which the defendants were to move their circular saw mill to the land of the plaintiff, in the river bottom, near to the town of Gallatin, in Daviess county. The plaintiff was to furnish hay for the horses which were used to put the saw in motion; to board the hands, and wash for them; and to furnish the logs to be sawed into lumber. The defendants were the owners of the mill and the horses which they were to furnish; they were to provide the food for the horses, except hay, and to provide the necessary hands to keep the mill in operation, and were to saw the logs, which were provided by the plaintiff, into lumber, which was to be divided, one half to plaintiff and the other to defendants.

Upon these facts, the circuit court decided (who tried the case without a jury) that the justice of the peace had no jurisdiction; that there was a partnership between the plaintiff and the defendants in the lumber sawed, and that the suit should have been brought for a settlement of the whole partnership concerns.

To this opinion of the court the plaintiff excepted, and brought the case here by appeal.

The only question arises on the facts of the case, whether the court below properly held that they proved a partnership.

This being the only point for the decision of this court, it becomes necessary to see what constitutes a partnership. Justice Story says, "every real partnership, so intended, between the parties themselves, imports *ex vi termini* a community of interest in the profits of the business of the partnership, that is to say, a joint and mutual interest in the profits thereof, or a community of profit. This is of the very essence of the contract; for, without this communion of profit, a partnership cannot, in the contemplation of law, exist:" Story on Partnership, page 22. Colyer expresses the doctrine in the following terms: "To constitute a partnership between the partners themselves, there

[* 483] must be a *communion of profit between them.

A communion of profit implies a communion of loss; for every man who has a share in the profits of a trade ought also to bear his share of the loss. By a communion of profit is intended a joint and mutual interest in profit:” Collyer on Partnership, book 1, ch. 9, sec. 1, page 11.

Chancellor Kent says: “There must be a communion of profit to constitute a partnership as between the partners. They must not be jointly concerned in the purchase only, but jointly concerned in the future sale. A joint purchase, with a view to separate and distinct sale by each person on his own account, is not sufficient.” 3 Kent Com. 25.

“The rule that all who participate in profits are liable as partners, is subject to many exceptions. If three enter into an agreement, by the terms of which one is to do certain things and the other two certain things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject matter of the contract, this does not constitute them all partners and make them all liable for expenses incurred by either in the performance of their part of the contract.” 6 Watts & Sergeant’s Rep. 143.

“By written contract between B. and R., B. agrees to furnish R. for one year with wool to be worked into satinets, and R. is to deliver to B. all the satinets which the wool will make, and is to find and pay for warps for the same. For working the wool, finding warps, &c., B. is to pay R. forty per cent. on the sales of the satinets. Each is to pay half the charges. B. is to have the whole direction of the sales, and should he make sales himself, he is to have one and a half per cent. on forty per cent. of the sales. In an action against B. and R. for the price of the warps furnished by the plaintiff to R., it was held that B. was not a partner of R., and consequently was not liable to the action. In this case, it is admitted that they were not partners *inter se*, for, by the terms of their agreement, they had not a mutual interest in the profits and loss of the business to which it related, and which is essential to render a partnership complete.” See 14 Pickering, 194, Turner v. Bissell *et al.*

"To constitute a partnership there must be a community of interest, a participation in profit and loss; and this joint interest must continue to the time of the sale, as well as to the purchase:" Washington's C. C. Rep. 492.

"Where one party furnishes a boat and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. Here the plaintiffs were to divide the gross earnings of the boat, without reference to the usual and customary expenditures. Such a *connection has been repeatedly [*484] held not to constitute a partnership." 10 Vermont, 172.

Now, apply the principles here laid down by the elementary writers, and the doctrines of the adjudications above referred to, to the facts of the case before us, and it becomes evident that there was no partnership here. One party was to furnish mill and hands to saw; the other party to furnish logs to be sawed; and they were to divide the lumber into which the logs were sawed. Nothing said about profits nor losses, nor about the right of either to sell the lumber. If the mill of the defendant should happen to break, or the team of the plaintiff become worn out so that he could not haul nor they saw logs—no joint expense for reparation or recruiting—no deduction of losses before a division of the lumber, but simply the logs to be hauled by one and sawed by the other, and the lumber, whether much or little, to be divided.

The facts do not constitute a partnership as among themselves, and, the other Judges concurring, the judgment below must be reversed, and the case remanded for further proceedings in accordance with this opinion.

WOODS *et al.*, defendants in error, v. RAINEY, plaintiff in error.

15 Mo. 484.

1. It appeared that defendants signed an obligation to pay to the State of Missouri the sum of ten thousand dollars upon a failure to perform certain conditions, but the conditions were not stated in the petition, and the bond was not upon the record. Held, that the petition was insufficient.

[The syllabus states the whole case and it is not thought necessary to give it in full.]

The State v. Henderson & Powers. 15 Mo.

THE STATE, plaintiff in error, v. HENDERSON & POWERS, defendants in error.

15 Mo. 486.

Criminal law—Indictment.—An indictment for obstructing process must recite the writ, in order that the court may see that it was such a writ as the officer had a right to execute.

Error to Newton Circuit Court.

GARDENHIRE, Attorney General, for the State.

RYLAND, J., delivered the opinion of the court.

The defendants, John Henderson and Joseph Powers, were indicted at the April term, 1850, of the circuit court for the county of Newton, for opposing the execution of civil process.

The defendants entered their appearance to the indictment, and moved the court to quash it. This motion the court sustained, and the State, by the circuit attorney, excepted, filed her bill of exceptions and brings the case here by writ of error.

The sufficiency of the indictment is the only point before us. [* 487] This indictment alleges "that John Henderson and Joseph Powers, late of said county, heretofore, to-wit: on the 28th day of October, A. D. 1849, at the county of Newton, State of Missouri, with force and arms did then and there unlawfully, knowingly and willfully oppose one Isaac Gibson, a constable of Neosho township, Newton county, Missouri, in his official duties as such; to-wit: in the execution of a writ of attachment issued by one Mark A. Garrison, a justice of the peace for said county and township, against the property of one James Boyd, in favor of one Lemuel Heanell, contrary," &c.

This indictment is framed under the 18th section, V article of act concerning Crimes and Punishments, Digest 1845, which declares "if any person or persons shall knowingly and willfully obstruct, resist or oppose any sheriff, or any other ministerial officer in the service or execution, or in the attempt to serve or execute any writ, warrant or process, original or judicial, or in the discharge of any other duty in any case, civil or criminal, other

than felony, or in the service or attempt to serve any order or rule of court in any case, every person so offending, shall on conviction, be adjudged guilty of a misdemeanor and be punished," &c. (a)

The objections urged below to the indictment are, that no offense is charged with that certainty that is required by law, and that the indictment, on its face, is defective and insufficient.

We think the objections are well taken, and that the court below properly sustained the motion to quash.

The indictment should have recited the writ of which the defendants are charged to have opposed the execution, in order that the court might see that it was such a writ as the constable had by law a right to execute.

The indictment is much too general; it should have specified with more particularity the writ. The offense consists in opposing the execution of process authorized by law; it becomes necessary then, in all such cases, so to state or recite the process, that the courts may see that the officer opposed or obstructed had the legal authority to execute the process in question. (b)

The other Judges concurring, the judgment below is affirmed.

SKINNER, appellant, v. ELLINGTON, respondent.

15 Mo. 488.

Practice.—Art. 15, § 3 of the Practice act of 1849 construed.

Appeal from the Platte Circuit Court.

A. LEONARD, for appellant.

S. L. LEONARD, *contra*.

GAMBLE, J., delivered the opinion of the court. [489]

Skinner brought a civil action against Ellington, stating in his

(a) Gen'l Stat. of 1865, chap. 203, § 19; Wagner's Stat. p. 479.

(b) See State v. Dickerson, 24 Mo. 365.

petition his ground of action in different forms, and claiming different sums of money as one or the other of the alternative statements of facts might be established. The defendant, Ellington, answered, and the parties proceeded to trial before the court, each party waiving a trial by jury. The court having heard the evidence, made a decision as required by the code of practice: first stating the facts found, and then the conclusion of law upon the facts, and upon this decision the judgment was rendered in favor of the plaintiff for a less sum than he claimed. At the trial, instructions in the same form as used in jury trials were asked by each party. All asked by plaintiff were given, and of the defendant's some were given and others refused. After the decision of the court, a motion was made for a new trial in the form used in our former practice, assigning the usual reasons. Among the reasons, are the two, that the finding of the court was contrary to evidence, and that the court had given improper instructions for defendant. There was no case made setting forth the questions of fact or of law, upon which a review was asked with the evidence applicable to such questions as is required by the 3rd section of article 15 of the Practice Act.

In this condition of the record, this court can only look to the decision of the court, and if the facts found warrant the conclusion of law pronounced by the court, the judgment rendered thereon must be affirmed. The correctness of the conclusion drawn by the court from the facts is not disputed seriously, and if it were, there is no doubt entertained of its correctness.

The code designs in the proceedings to obtain a review, to have the distinct question of fact or of law upon which the [* 490] review is sought, *stated in the application, and then to have a case made in which the evidence material to that question shall be stated.

The dangers of mistake in preparing a case, and the difficulties attending the preservation of the questions of law, would seem to recommend the use of a jury in every really disputed case.

The judgment is affirmed.

The State, use of Blanton's Adm'r, v. Hunter *et al.* 15 Mo.

THE STATE, use of Blanton's Adm'r, plaintiff in error, v. HUNTER *et al.*, defendants in error.

15 Mo. 490.

Administration—De bonis non.—The principle of the common law, which entitled an administrator *de bonis non* to those goods only which remained in specie, and not administered on by the first administrator, is abolished by the system of administration introduced in this State.(a)

Error to Andrew Circuit Court.

VORIES, for plaintiff in error.

*A. LEONARD, *contra.*

[* 491]

SCOTT, J., delivered the opinion of the court.

This was an action by B. Stanton, administrator de bonis non of Joel Blanton, deceased, against Isaac Blanton, former administrator of said Joel Blanton, and his securities, on their bond. The main breach alleged is, that while said Isaac Blanton was administrator as aforesaid, he received the sum of \$895 as assets, and that his letters were subsequently revoked, and that he failed to account for said sum, but converted it to his own use. A demurrer to this declaration being sustained, the case was brought here by writ of error.

It is obvious that the principle of the common law, which entitled an administrator de bonis non, to those goods only which remained in specie, and not administered on by the first administrator, is abolished by the system of administration introduced in this State. If an administrator, de bonis non, could not sue on the bond of the former administrator, our administration law, so far as it respects the payment of debts and distributions, would be entirely overthrown. How could there be an apportionment of the assets among creditors in the same degree, if one creditor was allowed to sue on the bond of the first administrator *and recover his entire debt? The view of the court [* 492]

(a) Overruling Harney v. Dutcher, *ante.* 89.

Hughes v. Woosley. 15 Mo.

below, that an administrator de bonis non could not sue on the bond of a former administrator, was clearly erroneous. When there are debts to pay, he would seem to be the only person that could sue. This question has been formerly determined by this court. *State, to the use of Darland, v. Porter et al.*, 9 Mo. Rep. 356.(a)

The other Judges concurring, the judgment of the court below will be reversed and the cause remanded.

HUGHES, appellant v. WOOSLEY, respondent.

15 Mo. 492.

Action—Account.—Form of declaration approved.

Appeal from Andrew Circuit Court.

VORIES, for appellant.

S. L. LEONARD, *contra*.

[* 493] *SCOTT, J., delivered the opinion of the court.

This was an action of account, begun by Hughes against Woosley: A demurrer to the declaration being sustained, the cause was brought here by appeal.

There were six counts in the declaration, and, in order that the nature of the objections to it may be better understood, one of the counts will be substantially set out. It is as follows: E. Hughes complains of James Woosley, of a plea, etc.: For that; whereas the said defendant, at, etc., had been bailiff to the plaintiff from the — day of —, in the year —, to the — day of — in the year —, and during all that time had the care and management of divers goods and chattels of the plaintiff, to-wit: one undivided half of one hundred head of horses, all of the value of \$10,000, to merchandise and make profit thereof, for the

(a) Gen'l Stat. of 1865, chap. 120, § 48; Wagner's Stat. p. 77; *State v. Fulton*, 35 Mo. 323.

plaintiff, and thereof to render the plaintiff the said defendant's reasonable account thereof on demand, yet the said defendant, though requested, hath not rendered his reasonable account thereof, but neglects so to do.

It will be sufficient to say, that upon a comparison of the declaration above set forth with the most approved forms of declarations in the action of account, it will be found to correspond with them. The declaration in the great case of Godfrey v. Saunders, 3 Wilson 94, is substantially the same as that used by the pleader in this action. With the difficulties and delays attending this form of proceeding, this court has nothing to do. At the time of the beginning of this suit, this form of remedy was open to the plaintiff, and as he has seen proper to adopt it, we are bound to sustain him.

The other Judges concurring, the judgment will be reversed and the cause remanded.

TOLSON'S Administrator, defendant in error, v. GARNER, plaintiff
in error.

15 Mo. 494.

1. *Contract—Capacity.*—One against whom a contract is set up, may show in avoidance of it that at the time of making it, he was not possessed of sufficient reason, to be capable of understanding the act he was performing.
2. *Contract—Non compos.*—Even if the conveyance of an insane person is voidable only, it may be avoided by the guardian of the insane person.

Error to Howard Circuit Court.

DAVIS & LEONARD, for plaintiff in error.

CLARK & PREWITT, *contra*.

*GAMBLE, J., delivered the opinion of the court. [*495]

This was an action of detinue for slaves, commenced in the

name of Polly Tolson, a person of unsound mind, by her guardian. The plaintiff's evidence consisted of the proceedings in the county court of Howard county upon an inquest of lunacy, in which Polly Tolson was found to be a person of unsound mind, and a guardian was appointed; of proof that the slaves had been in the possession and were the property of the plaintiff, and that they had been demanded from the defendant, who had them in possession at the commencement of the suit. The defendant relied upon a conveyance of the slaves, made by Polly Tolson to her, prior to the appointment of the guardian. This conveyance was attacked upon the ground, that at the time of making it, Polly Tolson was of unsound mind and incapable of disposing of her property.

Upon the question of insanity, much evidence was given, which need not be stated, as the case is here to be decided upon the questions of law arising upon the instructions of the court, given and refused.

The defendant asked the court to give to the jury nine instructions, of which the fourth, sixth, seventh and eighth were given and the others refused. They are as follows :

1. "If the jury believe from the evidence, that Polly Tolson executed the deed offered in evidence, dated the third day of September, 1847, and thereby conveyed the negroes in controversy to the defendant, they must find for the defendant, although they may believe that at the time of such conveyance said Polly Tolson was of unsound mind."
2. "To enable the plaintiff to recover in this action, the jury must believe that at the time of executing the deed by Polly Tolson to defendant, she was totally deprived of intellect and incapable of the exercise of her reasoning faculties."
3. "Plaintiff cannot in this action avoid the deed offered in evidence, by proof of partial derangement of mind, or imbecility of mind not amounting to idiocy, or lunacy, and unless the jury believe from the evidence that at the time of executing the deed, Polly Tolson was *non compos mentis*, they must find for the defendant."
4. "Imbecility of mind, not amounting to lunacy or idiocy in the grantor of land, is not of itself sufficient to avoid a deed."

5. "*Non compos mentis* means a person who was of good and sound memory, and by the visitation of God has lost it, or he that by sickness, grief or other accident or any other cause, wholly loseth his understanding."

6. "If the jury believe from the evidence, that Polly Tolson at the *time of executing the deed offered in [*496] evidence had sufficient intellect to comprehend the nature of the transaction, they must find for the defendant, unless they further find that such deed was procured by fraud."

7. "The presumption of law is, that Polly Tolson, at the time of executing the deed, was of sound mind, and it devolves upon the plaintiff to prove that at the time she was of unsound mind."

8. "At law, fraud is never to be presumed, but must be proved by the party relying upon it to avoid a deed."

9. "If the jury believe from the evidence, that Polly Tolson executed the deed read in evidence on the 3rd day of September, 1847, and thereby conveyed the negroes in controversy to the defendant, they must find for the defendant, although they may believe that at the time of such conveyance said Polly Tolson was of unsound mind, unless they further find that execution of said deed was procured by fraud."

The plaintiff asked the court to give the following instructions, and they were all given, as follows :

1. "That although the jury may believe plaintiff not insane, yet they may take any weakness of intellect of plaintiff into consideration in determining the question of fraud."

2. "That if the jury believe from the evidence, that the plaintiff, at the time of the execution of the deed read in evidence by the defendant, was of unsound mind and incapable of comprehending the notion and object of the same, and the property sued for was the plaintiff's at the time of making said deed, they will find for the plaintiff."

3. "That if the jury believe from the evidence, that at the time of executing the deed read in evidence by the defendant, the plaintiff labored under a derangement of mind so as to render her incapable of comprehending the nature of said conveyance, and

that the negroes were the property of the plaintiff at the time of executing said deed, they will find for the plaintiff."

4. "That if the jury believe the plaintiff, a short time before the execution of the deed read in evidence by the defendant, was laboring under a general derangement of mind, so as to deprive her of the use of her mental faculties, the presumption is that such derangement existed unless the evidence shows that she was sane at the time of the execution of the deed."

5. "That although fraud is not to be presumed, it may be proved by circumstantial evidence.

The question which is first presented for consideration, is whether a person of unsound mind can avoid his own deed, upon the ground of insanity. It would be a waste of time at this day, [* 497] to examine the *correctness of Lord Coke's assertion, that "it is a maxim of the common law, that no person of full age shall be allowed by plea to stultify himself, and thereby avoid his deed or contract;" or to weigh against his authority the denial of Fitzherbert, that such was ever a maxim of the common law. It may be assumed that, in the present condition of the law as administered by the most enlightened tribunals, any man against whom a conveyance or contract is set up, is at liberty to show that at the time of making it he was not possessed of sufficient reason to be capable of understanding the act he was performing. While in that condition, his deed or contract has not that assent of the mind which is essential to the legal validity of such acts; and he is permitted now, notwithstanding the acquiescence of courts in other days, in the maxim stated by Lord Coke, to avail himself of this defense and avoid his contract. Some of the authorities, showing the present state of the law on this question, are cited in the brief filed for the defendant in error, to which many more might be added; but it would be a useless labor. In the opinion given by Mr. Justice Wilde, in *Mitchell v. Kingman*, 5 Pick. R. 431, there is a rapid and satisfactory examination of the earlier authorities, and Lord Coke's maxim is spoken of as of doubtful origin and authority. The weight of American authority is decidedly opposed to it.

In some cases there is a comparison instituted between the con-

tracts and conveyances of infants and those of persons of unsound mind, and the latter are said to be voidable only as those of infants are. In an opinion delivered by Judge Robertson, 1 J. J. Marshall, 236, in Breckridge's heirs v. Ormsby, the deed of a lunatic is held only to be voidable as the deed of an infant is; and there is there an elaborate examination of the law as to the mode by which an infant's deed may be avoided. So in Wait v. Maxwell, 5 Pick. 217, Chief Justice Parker, speaking of a deed made by a lunatic, says: "The deed of Dorothy Kemp (the lunatic) was not void, but only voidable. It conveyed a seizin to the grantee, defeasible by her, her heirs or devisees, when entry should be made to avoid it." Again he says: "The presumption of law was in favor of her capacity, and her deed was valid until by entry or action the grantee was ousted or the deed avoided."

It is not necessary, in this case, to attempt to trace the resemblance between the contract of infants and those of persons *non compos mentis*, with a view to find in the law regulating the contracts of infants, rules to be applied to the contracts of lunatics. An infant's deed for his land cannot be avoided until he comes of age, while it is said that his sale of a chattel may be avoided during his minority: 9 Cow. R. *626; 13 [* 498] Mass. R. 204, 205. If we regard the conveyance of the slaves in this case as only voidable, we do not doubt that the demand, made upon the defendant by the guardian of the plaintiff, before suit brought, was a sufficient avoidance of the deed or act of sale. Slaves, like other personal property, pass without writing, and the fact that there was an instrument of writing executed does not confer any other right upon the vendee than would be vested by a transfer without writing. Nor does the writing interpose any obstacles to the avoidance of the sale, which would not exist if the transfer had been without writing. It was made the duty of the guardian "to collect and take into his possession the goods, chattels, moneys and effects, books and other evidences of debt, and all writings touching the estate, real and personal, of the person under his guardianship:" Revised Code, 595, sec. 14.(a) The act directs the administration of the estate of the insane person, with

(a) Gen'l Stat. of 1865, chap. 40, § 14; Wagner's Stat. p. 713.

as much particularity as is required in the administration of intestates' estates, and the 19th section declares it to be the duty of the guardian to prosecute and defend all actions instituted in behalf of, or against, his ward. It can scarcely be doubted that the guardian, thus vested with the control and management of the estate of an insane person, although the strict legal title is not vested in him, is as competent to avoid the previous alienation of these slaves, made by his insane ward, as would be the present administrator who has succeeded him in the administration. These remarks are made upon the supposition that the transfer of the slaves was only voidable. If it be void, then no act was required previous to the institution of the suit.

If we examine the instructions given by the court, they will be found to be chiefly directed to the kind or degree of insanity that avoids the sale, and the court has laid down the law with limitations as favorable to the defendants as could be asked. The jury were told, that if Polly Tolson, at the time of making the conveyance, labored under a derangement of mind, so as to render her incapable of comprehending the nature of the conveyance, and that the negroes were hers at the time of making the deed, they should find for the plaintiff. On the part of the defendant, the court gave the converse of the proposition, telling the jury that if she had sufficient intellect to comprehend the nature of the transaction, they must find for the defendant, unless the deed was procured by fraud. The view thus taken by the circuit court, of the degree of insanity which would avoid a conveyance, was as favorable as the defendant could desire, and was altogether preferable to mere definitions of the different kinds of insanity mentioned by legal and medical writers.

[* 499] *The other instructions which speak of imbecility of minds, as a circumstance to be considered in determining the question of fraud, are not assailed in the argument.

The case appears to have been fairly put to the jury by the instructions of the court, and the judgment is affirmed.

Crow *et al.*, respondents, v. MARSHALL, appellant.

15 Mo. 499.

No error in the action of the court below.

Appeal from Boone Circuit Court.

*LEONARD, for appellant.

[* 502]

CLARK, *contra*.

SCOTT, J., delivered the opinion of the court.

It is impossible to read the evidence in this cause, and to say that the portions excluded affected the finding of the jury. The evidence for the plaintiff was confined to the issue that the defendant was about to remove his property out of the State with the intent to defraud his creditors. The bona fides of the debts alleged to be due by the defendant was not questioned by the evidence offered on the part of the plaintiff. No rebutting testimony or evidence showing that they were justly due could therefore have been necessary.

The evidence relative to the possession of a tract of land of forty acres, was of but little weight. It does not appear that its exclusion could have influenced the verdict of the jury. For some purpose, possession is *prima facie* evidence of a title in fee. But no one would hope to establish a reputation for wealth in this country by showing that he had cut timber on a forty acre tract of land. If the defendant had used the land in the manner he proposed to show, and that was the only evidence of his title, it surely would have availed little or nothing with the jury; certainly not enough to induce us to disturb the verdict, when we consider the magnitude of the debts proved to have been in existence at the time of suing out the attachment.

The exclusion of the evidence relative to the payment of some of the *debts since the beginning of the suit [* 503] did not prejudice the defendant, as the plaintiffs did not dispute their justice and validity.

The evidence offered to show that Marshall, the defendant, had been advised by W. Knox to secure Knox and Beman with the remnant of the goods, because they were his sureties, had been

previously given and as it was not controverted, a refusal to hear its repetition could not have prejudiced the defendant's cause, especially as he knew when he promised Crow a deed of trust on the goods, that Knox and Beman were his sureties. The evidence might have been received, but we cannot think that its exclusion would warrant a reversal of the judgment.

The other Judges concurring, the judgment will be affirmed.

THE STATE, plaintiff in error, v. WISHON, defendant in error.

15 Mo. 503.

1. *Criminal law—Indictment.*—An action for selling liquor without license is good.
2. *Indictment—Defective count.*—If one of several counts in an indictment be good, a motion to quash ought not to be sustained. The defendant should move to quash the defective count and not the whole indictment.
3. *Indictment—General verdict.*—One good count in an indictment will support a judgment after a general verdict of guilty.

Error to Crawford Circuit Court.

GARDENHIRE, Attorney General, for the State.

HAYDEN, *contra*.

RYLAND, J., delivered the opinion of the court.

Benjamin Wishon was indicted by the grand jury of [* 504] Crawford *county, at the May term of the circuit court, in the year 1851, for selling intoxicating liquor in a less quantity than one quart without a license.

The indictment contains two counts. The defendant appeared to the indictment and moved the court to quash the same. The court sustained the motion, and quashed the indictment. The State by her circuit attorney, excepted to the ruling of the court and brings the case here by writ of error.

The question for our consideration involves the sufficiency of the indictment, the first count of which is as follows :

"State of Missouri, }
County of Crawford. } In the Crawford Circuit Court.

May Term, A. D. 1851.

The grand jurors of the State of Missouri, empannelled, &c., in and for the body, &c., upon their oath present, that Benjamin Wishon, late of the county of Crawford, on, &c., at, &c., with force and arms at Crawford county aforesaid, unlawfully did directly sell intoxicating liquor in a less quantity than one quart, to-wit: one pint of whisky of the value of ten cents to one Michael Donovan, and one half pint of brandy of the value of ten cents to one M. Donovan then there being, without the said Benjamin Wishon then and there having a license for that purpose continuing in force, contrary to the form," &c.

The second count charges that the defendant sold intoxicating liquor in less quantity than one quart, to persons to the grand jurors unknown without his having a *dram-shop license* continuing in force, &c.

This second count is defective. It does not deny the having of a license generally, but confines the negation to a *dram-shop license*. This is not sufficient. (a)

The first count has this averment: it charges the sale to be without a license, in general terms, without specifying any particular kind of license. Under the decisions of this court, in the cases of *State v. Brown*, 8 Mo. Rep. 210, and *Neales v. The State*, 10 Mo. Rep. 498, the first count must be considered good and sufficient. (b)

To an indictment containing several counts, some of which are good and sufficient and others defective and insufficient, a motion to quash should not be sustained. If the indictree wishes to avail himself of any defect, or of any imperfection in the indictment, he should move the court to quash the defective counts only, and not quash the whole indictment where one count is good: See *State v. Rector*, 11 Mo. R. 28.

Motions to quash indictments are always addressed to the dis-

(a) *State v. Haden*, ante. p. 447.

(b) *State v. Hornbeak*, ante. p. 478.

cretion of the court. The court can overrule such motions and compel the defendant to plead or demur.

[* 505] *By the common law, the courts may, in their discretion, quash any indictment for any such insufficiency in the body of it as will render a judgment given on it against the defendant, erroneous ; but they are in no case bound so to do, *ex debito justitiæ*.

Courts cannot strike out counts out of an indictment, for it is the finding of the grand jury: 2 Strange 1026 ; 3 Bac. Ab'g. Indictment (K).

The courts can quash any defective indictment, or any insufficient count in the indictment. Such has ever been the practice in this State. The difference between striking out and quashing counts I apprehend is this, the motion to strike out was based upon the ground that the counts were too numerous. In the case referred to in Strange, *Rex v. Peutreuss et al.*, an assault was laid twenty-one different ways. On motion to strike out the counts, the court said it could not be done, being the finding of the grand jury. It does not appear that this motion was made because any one of these twenty-one counts was defective, but because there were so many. The indictment bore upon its face the design to vex.

The motion to quash is based upon the insufficiency of the counts.

I can see no good reason why an insufficient indictment may not be quashed on motion ; or why a defective count may not be quashed on motion. It is certainly the less expensive course to quash at once, rather than put the defendant to the trouble, and the State to the costs, of a trial on an indictment which cannot support a judgment afterwards, by reason of its insufficiency.

The law in criminal proceedings is well settled that one good count in an indictment, no matter how many insufficient ones there be, will support a judgment after a general verdict of guilty is found: 1 Johns. Rep. 320 ; 3 How. Miss. Rep. 422 ; Chitty Crim. Law, 640 ; 3 Scammon's Rep. 326. Consequently, it will be error to quash an indictment on motion, which has one good count. In

this case we think the first count in the indictment is good; it sufficiently charges the selling of intoxicating liquor in less quantity than one quart to a person, and without license. It does not state the price at which the liquor was sold, but needlessly states the value of the liquor. We do not consider the price material, though it would be better perhaps to state it.

In indictments for misdemeanors, as much technical precision and exactness are not required as are necessary in indictments for more grave and heinous offenses; and, wherever we find certainty to a common intent, we will not look with very scrutinizing care to find faults.

The court below erred in sustaining the motion to quash the *indictment in this case; the first count being, in [* 506] our opinion, sufficient. The other Judges concurring herein, the judgment below is reversed and this cause is remanded for further proceedings in accordance herewith. (a)

THE STATE, respondent, v. OWEN, appellant.

15 Mo. 506.

1. *Dramshops—License.*—A [license] must be obtained by any person wishing sell intoxicating liquors in a less quantity than one quart.
2. *Indictment.*—An indictment, charging the selling of one pint of whisky, without a dramshop, tavern, grocer's, merchant's, or any other kind of license, is sufficient.

Appeal from Laclede Circuit Court.

BALLOU, for appellant.

GARDENHIRE, *contra*.

RYLAND, J., delivered the opinion of the court.

George W. Owen was indicted by the grand jury at the September *term, 1850, of the circuit court within [* 507]

(a) State v. Jennings, 18 Mo. 435; State v. Woodward, 21 Mo. 265; State v. Watson, 31 Mo. 361; State v. McCue, 39 Mo. 112.

and for the county of Laclede, for selling intoxicating liquor in a less quantity than one quart without license.

The defendant appeared at the March term, 1851, of said circuit court and moved the court to quash the indictment. This motion was overruled. He then plead guilty; the court assessed his fine to twenty dollars and rendered judgment therefor.

The defendant then moved the court in arrest of the judgment, which motion was overruled, excepted to, and bill of exceptions filed. The defendant prayed an appeal to the supreme court, which was allowed him, and he brings the case now here for the consideration of this court.

The question involves the sufficiency of the indictment. The indictment charges that "George W. Owen, late of the county of Laclede, on &c., at &c., with force and arms did sell to a person to the jurors unknown intoxicating liquor in a less quantity than one quart, to-wit: one pint of whisky at and for the price and sum of five cents, without having a dram-shop license or tavern license, or grocer's license, or merchant's license, or any other kind of license, continuing in force during any of that time authorizing him so to sell, to-wit: on the day and year aforesaid, at the county aforesaid, contrary," &c.

Is it an offense by our laws for any person to sell intoxicating liquor in a less quantity than one quart without a license authorizing such sale? If it is, then this indictment is good.

The 1st section of the act concerning Inns and Taverns, Digest 1845, declares that "hereafter no person within this State, shall, without a tavern license continuing in force, directly or indirectly, sell, barter or deliver, or knowingly permit to be sold, bartered or delivered for, or on his or her account, any wine or spiritous liquors by less quantity than one quart," &c.

The 1st section of the act concerning groceries and dramshops, Digest 1845, declares, "that no person shall directly or indirectly, sell intoxicating liquors, without taking out a license as a grocer or dramshop-keeper.

By this last act, a grocer, being licensed, is permitted to sell intoxicating liquors in any quantity not less than a quart. No grocer, by this act, can sell any quantity less than a quart, nor shall

he permit any intoxicating liquors, sold by him, to be drank at his grocery, or any place under his control.

A dramshop-keeper is a person permitted by law, being licensed according to the provisions of said act, to sell intoxicating liquors in any quantity less than a quart.

The same person may obtain license as a grocer, and [508] also license as a dramshop-keeper, and carry on the business of both at the same time. By this statute the grocer could not sell under a quart, nor the dramshop-keeper over a quart.

In 1846-7, the legislature declared by statute amendatory to the act to regulate Inns and Taverns, approved March 18th, 1835, and which was adopted in the Digest of 1845, the first section of which I have quoted above in this opinion, that "no person, by virtue of any tavern license, shall be authorized to sell intoxicating liquors in any quantity less than one quart, nor in any quantity to be drank at the place of sale; but the county court of the proper county may grant to any tavern keeper a license to keep a dramshop, upon such applicant paying the tax and complying with the provisions of the law concerning dramshops. See acts of session, 1846-7, page 59. This last act was repealed in 1849. See acts 1849, page 56.

In 1848-9, the legislature amended the act concerning Inns and Taverns, in regard to the amount of tax for the license, and repealed the 7th and 8th sections of the law of 1845 on the same subject, but made no change in regard to the quantity nor necessity of license.

In 1849 the legislature passed an act amendatory of the act concerning groceries and dramshops, by which they declared, "that hereafter any dramshop-keeper shall be permitted to sell intoxicating liquors, in any quantity not exceeding ten gallons at any one time." This last mentioned statute altered the grocers and dramshop-keepers act of 1845 so far as to permit the dramshopkeepers to sell under his license any quantity not exceeding ten gallons, but he must still have a license or order to sell as a dramshop-keeper. The grocer's law remains, so far as respects the quantity permitted to be sold, the same as it was in 1845. The

dramshop-keeper is now permitted to sell any quantity not exceeding ten gallons, under his dramshop license ; before he could not sell any quantity over a quart under his dramshop license.

From this general outline of our statutory law upon this subject; it is plainly to be seen, that a license is still necessary in order to to carry on the business of a grocer, dramshop-keeper, or a tavern-keeper. A license is necessary to be obtained by any person who wishes to sell intoxicating liquors in a less quantity than one quart.

The indictment in this case, negatives the idea, that the defendant had any license of any kind authorizing him to sell intoxicating liquor in a less quantity than a quart. It avers that he did sell in a less quantity, namely one pint; that he had no license authorizing such sale. I am of the opinion the indictment [* 509] is sufficient, and that the court below *committed no error in overruling the motions to quash the indictment, or in arrest of judgment.(a)

The objection about the unconstitutionality of the statute requiring such license, before a person is permitted to sell intoxicating liquors, could not have been seriously made. We shall pass it by as unworthy of any further observation.

I have looked carefully into the other reasons assigned to arrest the judgment, and find them untenable ; and the other Judges concurring, the judgment below is affirmed.

THE STATE, respondent, v. PUGH, appellant.

15 Mo. 509.

Indictment.—An indictment on the statute prohibiting the torture of animals (Rev. Stat. 406), must set out the means of producing the torture, so that the court may see that such means have the inevitable and natural tendency to produce the effect in which the criminality consists.

Appeal from Newton Circuit Court.

(a) See *ante*. State v. Haden, p. 447 ; State v. Hornbeak, p. 478 ; State v. Wishon, p. 503.

EDWARDS, for appellant.

*GARDENHIRE, *contra*.

[* 510]

RYLAND, J., delivered the opinion of the court.

The defendant, James Pugh, jr., was indicted by the grand jury of Newton county, at the May term of the circuit court, in the year eighteen hundred and fifty-one, for unlawfully, maliciously, and cruelly torturing the horses of one Samuel Hearrell.

The defendant appeared to the indictment at the November term following of said court, and moved to quash the indictment for want of a prosecutor's name endorsed thereon. This motion was overruled, and I find that it was properly overruled, as the record shows the facts to be that said Hearrell acknowledged himself, by endorsing the indictment, to be the prosecutor thereof.

The defendant then filed his demurrer to the indictment, which upon consideration of the court, was overruled, and the indictment declared sufficient. The defendant being called upon to plead to the indictment, stood mute, and the court had the plea of not guilty entered for the defendant. On this plea a trial was had; the jury found the defendant guilty, and assessed his fine to one dollar.

The defendant then moved the court to arrest the judgment for the insufficiency of the indictment; this motion being overruled, he excepted, filed his bill of exceptions, and prayed an appeal to this court.

The question before us, then, is in relation to the sufficiency of the indictment.

The indictment is found under the provisions of our statute concerning "Crimes and Punishments," art. VIII, sec. 38, which is in these words: "Every person who shall maliciously and cruelly maim, beat or torture any horse, ox or other cattle, whether belonging to himself or another, shall, on conviction, be adjudged guilty of a misdemeanor, and fined not exceeding fifty dollars." (a)

The indictment charges that the defendant did "unlawfully, maliciously and cruelly torture the horses of one Samuel Hearrell,

(a) Gen'l Stat. of 1865, chap. 206, § 46; Wagner's Stat., p. 505.

to-wit: one sorrel mare, of the value of forty dollars; one clay bank horse, a gelding, of the value of sixty dollars; one bay filly, of the value of twenty-five dollars, by then and there *tying brush and boards* to the tails of said horses, and other wrongs to [* 511] the said horses, he, the said James Pugh, *jr., then and there did, to the great injury of said horses, and to the great damage of the said Samuel Hearrell, contrary," &c.

From this indictment, the torture is charged to consist in the act of *tying brush and boards to the tails* of the animals. We do not consider this wanton and very reprehensible act of itself to come within the meaning of this section. This may be done for all we can see, and yet produce no torture to the horses. The circumstances accompanying the act, the consequences produced by the act may have been the means of much pain and torture to the animals; and if so, there should have been proper averments in the indictment.

A boy may tie a brush to the tail of a horse, and it may not produce even fear or cause any alarm to the animal, or it may occasion so much alarm and cause such efforts on the part of the animal to escape from it, as may indicate great suffering and pain. In all acts of this character, the means of producing the torture must be averred, and the courts must see that such means have the inevitable and natural tendency to produce the effect in which the criminal charge consists. Torture is defined to be: 1. Torments judicially inflicted; pain by which guilt is punished or confession extorted. 2. Pain, anguish, pang.—Dr. Johnson. Webster defines it to be: 1. Extreme pain, anguish of body or mind; 2. pang, agony, torment.

The torture here alluded to must consist in some violent, wanton and cruel act, necessarily producing pain and suffering to the animal. Now it is manifest that, from tying a brush or board to the tail of a horse, different effects may follow from the circumstances accompanying the act, as well as from the manner and place in which the act is done, or from the nature and qualities of the animal. A fiery, high-mettled and wild horse, may kill himself in order to escape from the troublesome and frightful appendage to his tail. A gentle, faithful old farm horse, with more hard

sense than the mischievous lad who sought to frighten him, may not mind the brush or board, but may carry it to his owner to have it taken off without suffering a fatigue.

Suppose the tying had been in a stable, so that the animals could not have had room to run to hurt themselves, this could not have been the torture provided in our statute; therefore, the mere act of tying brush or boards to the tail of a horse, unaccompanied with averments declaring the effects of the act, could never have been in the minds of the framers of this statute.

I am satisfied, upon a full consideration of the subject, that the indictment in this case is too defective, too loose and vague to support the judgment rendered upon it. This being the opinion of the other Judges, the judgment below is reversed.

THE STATE, defendant in error, v. HUTSON, plaintiff in error.

15 Mo. 512.

Indictment—Misnomer.—Hutson, for Hudson, in an indictment, is not a misnomer.

Error to Jackson Circuit Court.

HICKS, for plaintiff in error.

GARDENHIRE, Attorney General, *contra*.

RYLAND, J., delivered the opinion of the court.

This was an indictment found by the grand jury of Jackson county, at the March term of the circuit court, in the year 1851, against Thos. Hutson, the plaintiff in error, for selling intoxicating liquor in a less quantity than a quart, without license.

The defendant below appeared to the indictment and filed his plea in abatement, alleging a misnomer in this, that his name is "Thomas Hudson, and not Thomas Hutson."

The State demurred to this plea, and the court below sustained the demurrer. The defendant was required to answer

[* 513] to the indictment. A *plea of not guilty was entered, a trial had thereon, the defendant was found guilty, and judgment rendered against him for the fine assessed by the jury. the defendant filed his bill of exceptions to the ruling of the court below against him, and brings the case to this court by writ of error.

The only point relied upon for reversing the judgment below arises on the plea in abatement and the demurrer thereto, and the ruling of the court thereon.

We find no error in the court below in sustaining the demurrer to this plea. This case comes fully within the principles contained in the case of *Wilkerson v. The State*, 13 Mo. Rep. 91, and to that case we refer, as fully deciding this.

The judgment is affirmed, the other Judges concurring.(a)

STATE, defendant in error, v. STONE, plaintiff in error.

15 Mo. 513.

Indictment.—An indictment for Sabbath breaking, charging that the labor was not “a work of daily necessity,” is bad. The word “daily” is not used in the statute in this connection.

Error to Greene Circuit Court.

HENDRICK, for plaintiff in error.

GARDENHIRE, Attorney General, *contra*.

[* 514] *RYLAND, J., delivered the opinion of the court.

Benjamin Stone, the plaintiff in error, was indicted by the grand jury of Greene county, at the December term of the circuit court in the year 1850, for Sabbath breaking.

He appeared to the indictment at the June term, 1851, and

(a) As to what has been held to be *idem sonans*, see *Wilkerson v. State*, 13 Mo. 91; *Sunday v. State*, 14 Mo. 417; *State v. Haverly*, 21 Mo. 493; *State v. Blankenship*, *ib.* 504. As to what has been held a variance, see *State v. Curran*, 18 Mo. 320.

moved the court to quash the indictment. The court overruled his motion. He thereupon plead guilty and was fined two dollars by the court. He afterwards moved in arrest of judgment, assigning in support thereof the insufficiency of the indictment. This motion was likewise overruled; the defendant below excepted to the opinion of the court in overruling the motion in arrest, and brings the case here by writ of error.

The sufficiency of the indictment requires our consideration. The labor charged to have been done, was the "hauling some brandy and shock corn." The pleader charges that the defendant "did then and there unlawfully perform work and labor on said day, by then and there hauling some brandy and shock corn, which said labor was not then and there performed as a work of daily necessity, or as a household office of daily necessity, or work of charity, contrary," &c. The words of the statute are "every person who shall either labor himself, or compel his apprentice, servant or slave, or any other person under his charge or control to labor or perform any work, other than the household offices of daily necessity, or other works of necessity, or charity, on the first day of the week commonly called Sunday, shall be deemed guilty of a misdemeanor," &c. (a)

The indictment has the word "daily" before necessity, making it a word of daily necessity," whereas the statute merely uses the words "or other works of necessity" leaving out the word daily.

Although much disposed to overlook slight and mere formal objections of this character, yet I am satisfied that this indictment is substantially defective.

The circuit attorney has with too much carelessness endeavored to bring the defendant within the above statute. Why not use the words of the statute, when the whole offense is merely the creature of the statute? Why resort to any other and different exceptions or different descriptive words of the prohibited act? Why, when the legislature uses the words "works of necessity," shall the circuit attorney undertake to alter them, by putting the word "daily" as a qualification to the necessity? If he can do this he may add the "hourly" or "weekly."

(b) Gen'l Stat. of 1865, chap. 206, § 33; Wagner's Stat., p. 504.

State v. Swadley. 15 Mo.

[*515] *The indictment is defective, substantially bad; and the court below ought to have arrested the judgment on the defendant's motion. Its judgment is reversed, the other Judges concurring.

STATE v. SWADLEY.

15 Mo. 515.

[This case depends entirely upon the laws relating to slavery, and is of no present value.]

DECISIONS
OF
THE SUPREME COURT
OF THE
STATE OF MISSOURI,
MARCH TERM, 1852.

RIDDICK, appellant, v. WALSH, respondent,

and

RIDDICK, respondent, v. WALSH, appellant.

15 Mo. 519.

1. *Dower—Community.*—After the passage of the Territorial Act of July 4th, 1807, giving dower to the widow in the estate of her deceased husband, the Spanish law of community ceased to be in force.
2. *Laws—Construction.*—A thing which is in the intention of the makers of a statute, is as much within the statute as if it were within the letter.
3. *Dower.*—The law in force at the time of the husband's decease determines the widow's right to dower.
4. *Dower—Barred by execution.*—A special execution issued on a judgment rendered in a suit against the husband alone, to foreclose an equity of redemption under a mortgage, executed by the husband and wife, and accompanied by the wife's acknowledgment and relinquishment of dower, bars the wife's dower claimed under act of 1825.

Appeal from St. Louis Circuit Court.

[In this case both parties appealed.]

SPALDING, CASSELBERRY & HAIGHT, for plaintiff.

B. B. DAYTON, *contra*.

[* 534] *SCOTT, J., delivered the opinion of the court.

The first question which presents itself for our consideration is, whether, after the taking effect of the territorial act of July 4th, 1807, which gave dower to the widow in her deceased husband's estate, the widow of a deceased person, who was married subsequently to the period that the said act took effect, and prior to the introduction of the common law of England, was entitled to the provision made for her by the Spanish law of community, in addition to her dower; or, in other words, whether the Spanish law of community prevailed in this State after the taking effect of the act of July 4th, 1807, in favor of women who were married subsequent to that event. The question is stated with this precision in order to relieve us from answering a portion of the argument which is founded on a state of circumstances which do not exist in the cause now under consideration.

By the Spanish law of community, the husband and wife became partners in all the estate, real and personal, which they respectively possessed. All that was acquired or purchased during coverture, whether real or personal estate, went into partnership, as being presumed to have been the fruits of the joint industry and economy of the husband and wife. On the dissolution of the partnership by death the surviving party and the representatives of the deceased each took [* 535] *back what was brought, on his or her side, into the partnership, in value or kind; in value of personal estate, in kind of real estate; and what remained, being considered as gain or profits, was equally divided as between partners. The husband, being the most suitable person, managed the concerns of the partnership; and might, without the consent of the wife, dispose of any of the partnership effects, purchased during the marriage.

It is conceded that all the Spanish laws which prevailed here,

prior to the cession of Louisiana, continued in force until they were superseded by competent authority.

The act of 1807 gave the widow, as dower, in the event of there being lawful issue, one-third of the lands and slaves during her life, and one-third of the personal estate absolutely, after the payment of the debts of the deceased. Comparing this provision, for the widow, with the subsequent laws in relation to dower, we can see no great difference between it and the dower that has been allowed since the undoubted repeal of the law concerning community. The fact that the first provision made by law for widows does not materially vary from that now allowed them, furnishes an argument that, in the judgment of the Legislature, the dower given under the act of 1807 was a sufficient allowance for them; consequently there can be no ground for supposing that their rights, under the law of community, were intended to be preserved. A thing which is in the intention of the makers of a statute, is as much within the statute as if it were within the letter: 7 Bac. The act of 1807 made provision for the administration and distribution of the entire estate of a deceased person. It is impossible to conceive that if, in the intention of the legislature, the law of community existed, but that some mention of, some reference to it must have been made. Looking at the rights of the wife under the law of community, as above stated, could a statute for the administration of estates have been framed without some reference to it? If we reflect on the closeness of the connection between the two subjects, such an omission would have been almost a matter of impossibility. It may be put to the profession, whether, if the law of community was in force at this day, it would be possible to avoid its mention in framing the statutes concerning administrations, descents and distributions, and last wills and testaments. These statutes, with modifications, were in force from 1807 until 1816; and yet, during all that time, no reference was ever made in any of them to the law of community as being in force.

The 15th section of the act of 1807 declares that the share therein allotted to the widow, shall be in lieu and satisfaction of her dower at *common law. From the proviso [* 536]

to the 7th section of the act concerning dower and alimony, it would seem that the Spanish law, in relation to rights growing out of the marriage state, was in the mind of the legislature. It is said that there was no such thing as dower here at the date of the act of 1807, and consequently that the clause above cited provides that the widow's claim under it shall be in lieu of what she had no right to, and could not demand. We are so much in the habit of considering the common law of England as the only common law existing, that when these terms are used, we are at a loss to conceive how they can be applied to any other system of law. The idea of the common law is familiar to the minds of all legislators informed in our system of jurisprudence. It imports a system of unwritten law, not evidenced by statutes, but by tradition and the opinions and judgments of the sages of the law. Is it singular, then, that American legislators, coming into a country where they found existing a provision for married women, which was a substitute for dower as known to them, whose existence depended, so far as they knew, on unwritten law, custom and usage, should term that substitute "dower at common law?" Although the thing is misdescribed in terms, yet that which was intended is clearly signified. In construing a statute, we must, if possible, give effect to all its provisions. To say that the terms, "dower at common law," meant dower as it was understood by the English common law, would render the 15th section of the act of 1807 entirely inoperative. It is said that the law of community was evidenced by a written law promulgated by the king of Spain, to whom, under the Spanish system of government, exclusively belonged the power of legislation. This may be so; yet it is an historical fact, that the books containing those laws had never been seen at that day in this State. To the people here it was an unwritten law, known only by usage and custom as the common law was known, and under such circumstances it was not at all remarkable that it should be called "the common law." We are informed that the first printed book brought into this State, containing any Spanish law, was the *Partidas*, and that event occurred later than the year 1820. But there were weighty reasons operating on the minds of the legislature, why the Span-

ish law of community should be abolished, and dower, as known in the American States, substituted in its place. The French and Spanish inhabitants in the State, at that day, to whom the law of community was only known, were not numerous. No increase of their numbers was anticipated from immigration, while there were many Americans from the United States, to whom dower at common law was known and approved; and, if not then, it was *foreseen that in a few years they would be much [* 537] the larger portion of the inhabitants, and would continue to increase until there would be an unmeasurable disproportion between them and the ancient inhabitants of the province. It was wise in the legislature, then, to frame its laws in conformity to the notions of a large portion of the inhabitants then residing here, and who, it was foreseen, would in a few years overspread the entire State. It is a circumstance not without its influence in the determination of this question, that no case can be found in our books of reports in which this claim is asserted, much less maintained, although the period of forty-four years has elapsed since it might have been done. The case of *McNair v. Biddle*, 8 Mo. Rep., (a) is not an exception, as Mrs. McNair was [un]married prior to the passage of the act of 1807. We are of opinion, then, that the dower given to the surviving wife, by the law of 1807, was in lieu of her interest under the Spanish law, in what is called the community. (b)

The next question arising is, whether Mrs. Riddick was entitled to dower at her husband's death, in 1830, and if entitled, under what law that was in force at the date of the marriage, or that was prevailing at the time of the death of her husband? Judge Story, in his conflict of laws, says that the two following propositions have much of domestic authority for their support, and none in opposition to them: 1st. Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to personal property every-

(a) Page 257.

(b) *Reaume v. Chambers*, 22 Mo. 36.

where, upon the principle that movables have no *situs*, or rather, that they accompany the person everywhere. As to immovable property, the law *rei sitae* will prevail. 2nd. When there is no change of domicil, the same rule will apply to future acquisitions, as to present property. But where there is a change of domicil, the law of the actual domicil, and not of the matrimonial domicil, will govern as to all future acquisitions of movable property; and as to all immovable property, the law *rei sitae*. It would seem to follow, as a consequence from these principles, that the law existing at the time of the marriage, and not at the time of its dissolution by death, would determine the marital rights of the parties. Whatever might be the inclination of our minds in relation to this question, if it was now presented to us as a new one, yet the contrary opinion has so long prevailed, as well in regard to foreign as to domestic marriages, and has been so universally acted upon, that its overthrow would introduce great confusion in estates that have been already administered. If ever the maxim *communis error facit jus* was worthy of application, it would be on this occasion. The common opinion, in this [* 538] instance, is *not merely speculative and theoretical, but has been made the groundwork and substratum of practice. Every estate within our knowledge has been administered upon the supposition that the law existing at the time of the dissolution of the contract by death, regulates the right of the widow to dower, as well in cases where the marriage was celebrated in other States as in this State.

The next question that presents itself is, whether the special execution, issued on the judgment rendered in this suit to foreclose the equity of redemption under the mortgage, barred the dower of Mrs. Riddick. Mrs. R. was no party to the proceedings to foreclose the equity of redemption, although she executed the deed and relinquished her dower to the lands thereby conveyed. The act of 1825, under which the dower claimed in this suit must be assessed, provided that no widow should be entitled to dower in any lands which had been sold, in good faith, under execution against her husband in his lifetime.(a) There is no

(a) But see Gen'l Stat. of 1865, chap. 130, § 13; Wagner's Stat., p. 540.

difference affecting this question, between a sale under a general judgment and one under the statute concerning mortgages. A sale under a general judgment, conveys all the right, title and interest the debtor had in the lands sold on the day of the rendition of the judgment; a sale on a special fieri facias disposes of such right only as could have been conveyed at the date of the mortgage deed, had it been an absolute one. On the one hand, it was argued that as the land out of which this right of dower is claimed, had been sold under a special fieri facias on the judgment in the mortgage proceedings, that was a sale under execution, within the meaning of the act, and, therefore, the right of dower was barred. On the other hand, it was contended that the wife was a necessary party to the proceedings to foreclose the equity of redemption, and not being joined, she could not be affected by a judgment in a suit to which she was no party. There is a marked distinction throughout the books between cases where a suit affects a wife's interest in real estate, which is claimed in her own right, and those in which she has only an inchoate right of dower. In the former class of cases, no instance is to be found in which it is not maintained, that a wife is a necessary party to the proceedings, in order to divest her right. In the latter class, the husband alone is deemed the proper party to defend a proceeding instituted to divest the title to land to which a mere inchoate right of dower has attached. Who ever heard of a wife's being joined as a party defendant to an action of ejectment brought to recover land possessed and claimed by the husband in his own right? In the case now under consideration, if the husband had given no mortgage, and if suit had been brought for the debt secured by it, in the common way, *the land might have been sold by execution, and the [* 539] right of dower thereby extinguished. Can it make a difference, that a mode of procedure more favorable to the husband than an ordinary suit at law, was adopted? In the mode prescribed, the wife has given her assent to the deed, and there must have been at least nine months intervening between the commencement of the suit and the sale of the mortgaged premises. The fact that the mortgaged property could only have been sold on

the special execution, makes no difference; for if the execution had been a general one, the husband could have elected that the land mortgaged should have been first sold to satisfy the debt; and the property saved from execution by the sale of the mortgaged premises, would have remained, from which dower would have been taken.

The execution of the mortgage, with the wife's acknowledgment and relinquishment of dower, the proceedings to foreclose the equity of redemption, the judgment, execution and sale by the sheriff, together with his deed, are the links in the chain of title of the purchaser at the sheriff's sale. The wife having given her assent to the deed, and having a mere inchoate right to dower in her husband's estate, who was still in existence, and he being competent to defend such interests of the wife in all other proceedings against him, no reason is perceived why the wife should have been made a party to this suit. So, in neither point of view, the wife is barred of her dower. If, before the foreclosure the wife's right to dower had become consummate by the death of her husband, the attitude of this case would be entirely different.

The case of *Dent v. Narmy*, 8 Barbour's Rep. 618, has been examined, and it seems to stand so much upon the provisions of the N. Y. Code, as to furnish little analogy for the determination of the cause now under consideration. The case of *Bell v. The Mayor of New York*, 10 Paige's Rep. seems rather to furnish views in support of the conclusion to which we have arrived.

Judge Ryland concurring, the judgment will be reversed and the cause remanded. (a)

Judge Gamble did not sit in the cause.

(a) *Lee v. Lindell*, 22 Mo. 205; *Thornton v. Pigg*, 24 Mo. 249.

MUNFORD, respondent, *v.* WILSON *et al.*, appellants.

15 Mo. 540.

1. *Practice—Agreed case.*—An agreed case stands in lieu of a special verdict; and upon it the court pronounces the conclusion of law.^(a)
2. *Contracts—Rescission.*—A prior contract held to be rescinded by the making of a subsequent one between the same parties embracing the subject matter of the first.

C. GIBSON, for appellants.

U. WRIGHT & M. L. GRAY, *contra.*

GAMBLE, J., delivered the opinion of the court. [557]

The judgment in this case professes to be upon a case agreed, and the record contains an agreement signed by counsel, as well as letters and a deposition, which all appear to have been considered by the court.

Although the judgment has the agreed case for its foundation, the parties asked the court for a great number of instructions, of which some were given and some refused.

It is our understanding, that a judgment upon an agreed case is a judgment upon the facts which the parties have assented to and signed, and *which agreement stands in [* 558] lieu of a special verdict. The agreement is not in such case, used as evidence before the triers of fact, but is designed to form a part of the record, and upon it the court pronounces the conclusion of law, as would be done if the same facts were found by a jury, in the form of a special verdict. The parties may agree to certain facts involved in the case, which they do not wish to controvert, while they still dispute other matters of fact on either side. In such case, the agreement when signed, is used before the tribunal which tries the question of fact, as evidence, concluding the parties so far as they have agreed, but in that case, the judgment will be upon the finding of the facts and not upon an agreed case. This is mentioned at present for the reason that while counsel, with a proper and laudable desire to avoid

(a) Gen'l Stat. of 1865, chap. 171, §§ 25, 26; Wagner's Stat. p. 1056.

useless and expensive controversy about facts which they do not consider material to the interests of their respective clients, make agreements in relation to such facts, they may be apprised of the damages to their clients if they neglect to have the record exhibit the case in its proper legal aspect, so as to present the questions for review before this court.

In the present case, as the judgment by its own terms rests upon an agreed case, we look through the transcript to find it, and when found, we take the judgment to be the conclusion of law pronounced by the court upon the facts agreed by the parties. The instructions which were passed upon by the court below, are only useful here as a kind of index to the questions of law which the parties understood properly arose upon the facts agreed. We deal with the conclusion contained in the judgment.

The following is a sufficient synopsis of the facts in the case to show the questions of law involved :

Cornelia Hempstead, the widow, and Cornelia V. Hempstead, the minor daughter and heir of Thomas Hempstead, deceased, claimed to own or to have an interest in various portions of real estate of the deceased, which were held by other persons adversely. On the 6th of June, 1845, a contract was made between them and Mr. Munford, the plaintiff, who was an attorney and counselor at law and solicitor in chancery, which was signed and sealed by them, but not by him, by which they engaged his services as their sole counsel, to establish their right to an interest in a certain forty arpent lot, partly within the city of St. Louis, which had been purchased by Thomas and Charles S. Hempstead from Margaret Herbert dit Lecompte, on the 8th of January, 1818. They authorized him to institute such proceedings in law or equity as as he might judge proper to assert their rights, and to [* 559] compromise their *claims as he might judge advantageous for them, covenanting to give to Mr. Munford one-third part of whatever might be realized to either of them by compromise, or if property was recovered, to convey to him one-third part of what might be recovered.

On the 8th of June, 1845, there was another contract made by which it is recited that the estates of Thomas Hempstead and

Edward Hempstead were in great confusion, and that Cornelia, the widow, and Cornelia V., the daughter of Thomas Hempstead, have rights and interests in said estates, the enjoyment of which they were deprived of by the pretended claims of others, and therefore they engaged the professional services of Mr. Munford and Mr. Albert Todd, and agreed that they should be the sole and only counsel for the purpose of establishing the rights of the ladies in both of said estates. The attorneys were authorized to institute such suits as might be necessary to establish the rights of their clients, and the clients engaged that the attorneys should receive one-third of all property, money and effects to which the rights of the clients should be established, as compensation for their services.

Mr. Todd never performed any services under this contract, but in October succeeding its date, assigned all his interest under it to Mr. Munford. This latter gentleman, in November following, commenced a suit in chancery to recover a part of the property which is described in the agreement of the 6th of June. While this suit was pending one of the parties, defendant, compromised with the complainants through Munford the solicitor, and paid him \$2,100 for the relinquishment by the complainants of all their claim to the property which he held. The complainants executed the deed conveying their right; Munford received the money, and retaining one-third for himself, paid the two-thirds to the complainant, Mrs. Cornelia Hempstead. Afterwards, the complainants, without the knowledge of the counsel, Munford, compromised with the other defendants, receiving \$8,000 as the consideration for their relinquishment. The object of the present suit by Munford is, to recover the one-third of the money so received by his clients upon this compromise. The petition is entirely upon the first contract, dated on the 6th of June. It appears that while the suit brought by Munford for his clients was pending, they recognized him as their attorney, acting for them in the suit and expressed satisfaction with his attention to their interests. The agreement of the parties states no other facts in relation to the second contract, than that Todd did nothing under it and assigned his interest to Munford. It was after this assignment was made that the suit was brought in which the compro-

mise was made, and it is apparent that the clients recognized Mr. Munford as their counsel in that suit. [* 560] *Still, it is not agreed that the clients had any knowledge of the abandonment of the case by Mr. Todd, or of his assignment to Mr. Munford. That Munford should be spoken of by his clients, as their counsel, and his fidelity and diligence be praised, does not involve the knowledge on their part, that he was acting alone in their case, although it establishes the fact, that his professional services were highly satisfactory to his clients. The fact is agreed, that Cornelia V. Hempstead, the daughter, who was a minor when the different contracts were made and who subsequently inter-married with the defendant, Wilson, claimed no interest in the property for which the suit was brought and which was included in the compromise, except as daughter and heir of Thos. Hempstead.

The court below gave judgment in favor of Munford for one-third of the money recovered on the compromise, with interest.

Two questions are now presented for consideration. 1st.—Whether the contract of the 6th of June remained in force and binding upon the parties, after that of the 8th was made between the same clients and Messrs. Munford and Todd. 2nd.—Whether the contract is illegal, because it provides a compensation to the lawyer by giving him one-third of the property in dispute for which suit was to be brought. If the decision is to be adverse to the plaintiff on the first question, it will not be necessary to consider the second, as the parties have agreed upon the record, that if the plaintiff is not entitled to recover upon the contract sued upon, he shall have leave to amend and proceed upon a *quantum meruit* for the services rendered.

In order to determine the first question, whether the contract of the 8th of June is a contract substituted for that of the 6th, it is necessary to ascertain whether the “rights to be ascertained and established” by Munford and Todd, under the second contract, comprehend “the rights and interests to be established” by Mr. Munford under the first contract; for if they do, then it must either be held that the second is a substituted contract or that Munford is entitled to hold under both. That the second is more

comprehensive than the first contract, or that in some of its stipulations it varies from the first, affords no presumption against its being designed as a substitute for the first; for if it were identical with the first, in all its provisions and in its scope, there would appear to be no meaning in its execution.

The first contract commences with the recital, "that Cornelia, widow, and Cornelia V., daughter of Thomas Hempstead, claim an interest in a certain tract of land" and "that certain persons are depriving them of the possession and enjoyment of the property, by pretended claims;" *therefore, they [* 561] engage the professional services of Munford, to establish their rights and interests in the property. In this property it is agreed that the interest of the present Mrs. Wilson, was only as heir of her father, Thomas Hempstead.

The second contract begins with the recital "that the estates of Thomas Hempstead and Edward Hempstead are in great confusion and difficulty, and that Cornelia, the widow, and Cornelia V., the daughter of Thomas Hempstead, have rights and interests in said estates, of the enjoyment of which they are deprived by the pretended claims of others; therefore, for the purpose of ascertaining and establishing their rights and interests in both of said estates they thereby engage the professional services of Messrs. Munford and Todd."

The compensation to be received under each contract, in the event of a recovery of property, is one-third of all that may be recovered. In the first contract with Mr. Munford, there is the additional stipulation, that he shall have one-third of what may be realized by compromise.

The question to be determined is, whether, immediately after the execution of these two contracts, they were both subsisting agreements. If they were, then, undoubtedly, Mr. Todd had a right to take part in the litigation for the specific property mentioned in the first contract, for that was claimed to be a part of the estate of Thomas Hempstead, and he and Mr. Munford would, in the event of success, have taken under the two contracts, the lion's share of two-thirds of the spoils, while the widow and heir would have received the other third. The subsequent abandon-

ment by Mr. Todd of the contract of the 8th of June and his assignment of his interest to Munford, has no influence in determining the present question; nor is the recognition of Mr. Munford by the defendants, as their attorney, entitled to any weight in its determination. If the last contract superceded the first, the first was not revived, because of Mr. Todd's abandonment of the second, or because when Mr. Munford proceeded to institute suits, he was recognized as the attorney of the clients.

It is apparent that the specific property described in the first contract came within the scope of the second. It was claimed as property in which the mother and daughter were interested, as the widow and heir of Thomas Hempstead. It was property withheld from their possession and enjoyment by others claiming adversely. The object in employing an attorney was, to establish their rights and interests in the property. The second states the same condition, of the property belonging to the estates of Thomas and Edward Hempstead, the same obstruction to the enjoyment by the widow and daughter of their rights, and the same [* 562] *object in employing attorneys. If the first had never been made, there could be no question that the second would include the property mentioned in the first. There is nothing in the second that excepts that property from its operation. It seems impossible, when we examine the recitals of both and fix the measure of compensation to the same for the same services to be rendered, to imagine that the parties understood the first to be in force when the second was executed.

As both these contracts are under seal, and of the same dignity, the question does not arise, which has embarrassed courts whether a contract under seal can be varied, waived or discharged by parol. We look at the two instruments and find that all the parties to the first are parties to the second—that the second comprehends the first in the duties to be performed, and is like it in the compensation to be given. That the chief difference is, in the scope of the second being much greater than that of the first, embracing all the litigation that might arise in relation to two estates, while the first was confined to litigation about the title of one piece of property of one of the estates. The second engages

the services of the same attorney that was employed in the first contract and also of another attorney.

These two instruments form a part of the case agreed, and upon them it is evident that the first was absorbed in the second and was not a subsisting agreement after the second was executed. The plaintiff claims only under the first and is not entitled to recover under it because of the subsequent agreement.

As the second contract is not before the court for adjudication, it is not necessary to pass upon its merits, but it may be questionable, whether, according to its terms, any specific portion of the money obtained by compromise, can be recovered: *Evans v. Bell*, 6 Dana, 479.

The question which is presented and discussed in the written agreements filed by the counsel, whether the contracts are void because of champerty, has occupied our attention and the authorities have been examined, but to trace the law on that subject, from its very early history in England, would occupy more time and space than can be properly used in a case in which its decision is not necessary.

As the parties have agreed, that if the plaintiff is not entitled to recover upon the contract, he shall have leave to amend and recover upon a *quantum meruit*, the judgment will be reversed and the cause remanded for further proceedings.(a)

WALKER, appellant, v. THE CITY OF ST. LOUIS, respondent.

15 Mo. 563.

1. *Revenue—Taxes—Voluntary payment.*—Taxes paid to a city collector, with a full knowledge of all the facts, the city having a color of right to collect them, must be regarded as voluntary, and not made under such circumstances, as will authorize the party paying them to recover them back.
2. *Taxes—Illegal.*—The proper mode of resisting the payment of a tax, part of which is illegal, is to tender the amount really due and resist the payment of the balance.

(a) This case will be found again in 19 Mo. 669.

STATEMENT OF THE CASE.

This was an action, brought by Walker to recover of the city all the taxes beyond one-sixteenth of one per cent. per annum, paid by him from the year 1845 to 1849, inclusive, on real estate in the new limits.

The charter of 1841, which first brought within the city the property thus taxed, provided that the common council should within twelve months thereafter, cause to be graded and Macadamized the carriageway of Broadway, South Seventh, Washington Avenue and Market streets, 25 feet wide from the boundaries established by said charter, to the nearest point Macadamized within the old limits; and that until such carriageways were made and completed, the lots and grounds in the new limits, should not be taxed for city purposes, more than one-sixteenth of one per cent.

The plaintiff's petition alleges, that the city had not, before the commencement of this suit, caused said carriageway to be graded and Macadamized, according to the requirements of said act; but had, nevertheless, taxed the plaintiff's real estate within said new limits, during the several years named, at or about the rate of one per cent. each year, which taxes the plaintiff was compelled to pay, through the agency of collectors, directed to enforce collection thereof by distress of goods and chattels, or by the sale of the property taxed. The plaintiff claimed, that the city had no right to tax the property in question beyond one-sixteenth of one per cent. each year. The answer of the city sets out, particularly, what was done in an attempted compliance with the charter of 1841, in respect to grading and Macadamizing the carriageways or streets named, shows a strict compliance as to Broadway and Market streets, and, that a literal compliance could, not, in reference to South Seventh street, have been observed; that if said street had been extended, without deviation, it would have crossed Carondelet Avenue, and struck the river considerably north of the new southern boundary of the city, and would have cut up into irregular shape and pieces, lots and blocks previously laid out; impaired the beauty and regularity of that part of the city, occasioned great damage to the owners of said blocks and lots, and have subjected the city to the payment of heavy sums on account of such damages; that no satisfactory arrangement could be made with the proprietors of the land between Lafayette street and the southern limit of the city for extending South Seventh street through their lands to said limit: that in view and in consequence of all these difficulties, it was deemed advisable to connect South Seventh street with what had been called Carondelet Avenue, through Lafayette street, and grade and Macadamize a carriageway thereon, to such southern limits, which was done accordingly. The answer gives as a reason, for deviating from a direct line, in extending Washington Avenue to the new western limits of the city, that satisfactory terms could not be agreed upon, extending said avenue through the houses and grounds of Mr. Robbins.

The answer then charges, that the mode in which said streets were laid out, graded, &c., *besides being less expensive to [* 564] said city (of which the plaintiff was and has continued to be an inhabitant and tax payer), was as much in accordance with, and promotion of the general interest and convenience of the city and its inhabitants, as any other mode that could have been adopted; was never, in any manner, objected to by said plaintiff, but was acquiesced in by him and generally by said inhabitants; that having thus satisfactorily performed the condition of the charter, the city proceeded to levy and collect taxes in the new limits, at the same rate as in the old limits, and continued to do so down to the year 1850; that such taxes were paid without objection, except in three or four instances; that the plaintiff had invariably paid without any protest or objection whatever, and with a full knowledge of the facts upon which his rights in the matter depended, and with a knowledge that one or two other persons had obtained injunctions, restraining the city from collecting taxes beyond one-sixteenth of one per cent. on their property in the new limits. The answer denies all compulsion in collecting the taxes of the plaintiff. It charges, that about \$150,000 of the taxes collected within the new limits, had, at various times, been expended in grading and paving streets and alleys, and making other improvements in said new limits, with the knowledge of the plaintiff, without any objection from him, but with the acquiescence of himself and others owning property in said new limits, by means whereby the property of the plaintiff, in said new limits, had been increased in value.

The answer also states, that the remainder of the taxes collected on property in the new limit has all been expended in payment of the debts of the city, and in laying out and improving streets and alleys therein, and in other ways for the benefit of said city and the inhabitants thereof; all of which was done without objection on the part of said plaintiff, but with his knowledge and approbation, and whereby the plaintiff, as an inhabitant of and the owner of property in said city, was greatly benefitted.

The answer then claims, that the plaintiff, by having thus acquiesced in the mode of extending, grading and Macadamizing said streets, and by having, with a full knowledge of the facts, without compulsion, but voluntarily, paid the said taxes, and by having stood by and seen, without objection and with approbation, said taxes, as well as those collected of others, expended as aforesaid, in part for his own benefit, has barred and precluded himself from all right to recover any portion of said taxes.

SPALDING & SHEPELY and R. M. FIELD, for appellant.

H. S. GEYER and JOHN C. RICHARDSON, City Counselor, *contra*.

SCOTT, J., delivered the opinion of the court.

Although the ground on which this action rests for a [* 575] support, is, that *the defendant has received money to which the plaintiff is equitably entitled; yet it cannot be denied that this claim, if it had any foundation in law, is one *strictissimi juri*. The ground on which the plaintiff seeks to recover the taxes that have been paid, is, that there was a condition precedent, the performance of which was necessary to have enabled the defendant to demand the money, which, it is alleged, she has unjustly exacted from him. It is not pretended that the defendant has acted in bad faith, or that she has wantonly exacted money from the citizens, to which she had no color of right. She did that which was supposed to be a substantial performance of the condition which gave authority to assess and collect the taxes, the repayment of which is sought by this action. The plaintiff was a resident of the city, and, as this suit shows, owned a large portion of the property, which has been enhanced in value by the imposition of the taxes of which he now complains. A knowledge of the ordinances, passed in order to fulfill the condition precedent, on the performance of which a right to demand the taxes accrued, may be imputed to the plaintiff. Yet, with this knowledge, he makes no objection, pays the taxes, sees them applied to improvement and the enhancement of the value of the property on which they were levied, and years afterwards, for the first time, is the complaint of extortion made. Whether the condition was substantially complied with or not, is a question about which different opinions may be honestly entertained. But it is supposed that the judgment of this court, in the case of *Allen v. The City of St. Louis*,^(a) settles the question, that the condition precedent was not complied with. But does not that case also show, that if the plaintiff was unwilling to pay the taxes, he was under obligation to do so. He might have been relieved against the pretended exactions of the collector, if he saw proper. But he acquiesced; he paid his taxes, saw them applied to the improvement of that very property upon which they had been levied, and now, most unaccountably, would have them refunded to him. The main case

(a) 13 Mo. 400.

relied on by the plaintiff, is that of the Boston and Sandwich Glass Co. v. The City of Boston, 4 Met. 181. The principle of that case is, as stated, "that the warrant is in the nature of an execution, running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof and have a judicial decision of the question of his liability." Now, the case of Allen v. The City of St. Louis, on which the plaintiff relied to sustain his right of recovery, shows that he was not in the category of the Massachusetts taxpayers. He could have been protected from the operation of the collector's warrant, had he seen proper to take the necessary steps for that purpose. Such being the case, the [* 576] payments made to the city collector must be regarded as voluntary, and not made under such circumstances of duress as will authorize the party paying the tax to recover it. (a)

There is another aspect in which this case may be presented, which shows that the assumption of the plaintiff, that the taxes were extorted by duress, cannot be sustained. In the case of The City against Allen, the amount of the taxes, which might have been lawfully assessed, were tendered before any proceedings were had to restrain the collector. The city had a right to lay some portion of the tax which is now sought to be recovered, one-sixteenth of one per cent. The plaintiff's declaration concedes this. There were taxes, then, due the city by him. The collector could execute his warrant for them. They were not paid nor offered to be paid. The warrant, then, was not void. Now, the only mode in which the plaintiff could place the city in the attitude of a wrong-doer, in executing the distress warrant, was to tender the sum really due, and then to have resisted the payment of the excess above the legal rate of assessment. As he did not do this, he cannot now complain that the warrant was void for want of authority. The only ground on which this action can be supported is the total illegality of the warrant of distress. The principle, that an abuse of an authority in law or excess of it, will make the party a trespasser *ab initio*, is not applicable here. The city had an unquestionable right to levy a portion of tax. She had done

(a) Christy v. St. Louis, 20 Mo. 143.

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that which, she was advised, justified her in assessing the whole amount; and because she in consequence of this error, assessed a greater tax than she should have done, her act should be sustained to the extent of her authority. The collector, then, would not have been a trespasser or wrong-doer in levying this warrant; and if not, the whole foundation of the plaintiff's action, that the payment made by him was compulsory, in consequence of the illegality of the warrant, is swept from under him.

The other Judges concurring, the judgment will be affirmed.

SCOTT, a man of color, defendant in error, v. EMERSON, plaintiff in error.

15 Mo. 576.

Slavery—Removal to free State.—The voluntary removal of a slave, by his master, to a State or Territory, in which slavery is prohibited, with a view to a residence there, does not entitle the slave to sue for his freedom, in the courts of this State.(a) GAMBLE, J., dissenting.

Error to St. Louis Circuit Court.

NORRIS, for plaintiff in error.

D. B. HILL, *contra*.

[* 582] *SCOTT, J., delivered the opinion of the court.

This was an action instituted by Dred Scott against Irone Emerson, the wife and administratrix of Dr. John Emerson, to try his right to freedom. His claim is based upon the fact that his late master held him in servitude in the State of Illinois, and also in that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36 degrees 30 minutes, north latitude, not included within the limits of the State of Missouri.

(a) Overruling, 1 Mo. 472; 2 Mo. 19; *id.* 36; 3 Mo. 194; *id.* 270; *id.* 400; 4 Mo. 350; *id.* 592.

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It appears that his late master was a surgeon in the army of the United States, and during his continuance in the service, was stationed at Rock Island, a military post in the State of Illinois, and at Fort Snelling, also a military post in the territory of the United States, above described, at both of which places Scott was detained in servitude—at one place from the year 1834, until April or May, 1836; at the other from the period last mentioned until the year 1838. The jury was instructed, in effect, that if such were the facts, they would find for Scott. He, accordingly, obtained a verdict.

The defendant moved for a new trial on the ground of misdirection by the court, which being denied to her, she sued out this writ of error.

Cases of this kind are not strangers in our courts. Persons have been frequently here adjudged to be entitled to their freedom, on the ground that their masters held them in slavery in territories or States in which that institution was prohibited. From the first case decided in our courts, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right "to exact the forfeiture of emancipation," as they term it, on the ground, it would seem, that it is the duty of the courts of this State to carry into effect the constitution and laws of other States and territories, regardless of the rights, the policy or the institutions of the people of this State.

The States of this Union, although associated for [583] some purposes of government, yet in relation to their municipal concerns have always been regarded as foreign to each other. The law of descents of one State is not regarded in another, in the distribution of the estates of deceased persons. So of the law of wills, administrations, judicial proceedings, and all other matters of mere internal police. The courts of one State do not take judicial notice of the laws of other States. They, when it is necessary to be shown what they are, must be proved like other facts. So of the laws of the United States, enacted for the mere purpose of governing a territory. These

laws have no force in the States of the Union; they are local and relate to the municipal affairs of the territory. Their effect is confined within its limits, and beyond those limits they have no more effect, in any State, than the municipal laws of one State would have in any other State; *Cohen v. State of Virginia* 6 Wheat. 264. This doctrine is declared and maintained, not only with respect to nations strictly foreign to each other, but also to the several States of this Union. Every State has the right of determining how far, in a spirit of comity, it will respect the laws of other States. Those laws have no intrinsic right to be enforced beyond the limits of the State for which they were enacted. The respect allowed them will depend altogether on their conformity to the policy of our institutions. No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws. In the *Conflict of Laws*, sec. 36, it is said: "but of the nature, and extent and utility of this recognition of foreign laws, respecting the state and condition of persons, every nation must judge for itself, and certainly is not bound to recognize them, when they would be prejudicial to their own interests. It is, in the strictest sense a matter of the comity of nations, and not of any absolute paramount obligation, superceding all discretion on the subject." So in sec. 32, it is said, "it is difficult to conceive upon what ground a claim can be rested, to give any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects; it would at once annihilate the sovereignty and equality of every nation, which should be called upon to recognize and enforce them, or to compel it to desert its own proper interests and duty to its own subjects in favor of strangers, who were regardless of both. A claim so naked of any principle or just authority to support it, is wholly inadmissible."

Again, "the comity of nations is derived altogether from the voluntary consent of the State by which it is shown, and is inadmissible, when it is contrary to its known policy or pre-
[* 584] judicial to its interests. *In the silence of the positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of

them by their own government, unless they are repugnant to its policy or prejudicial to its interest." Sec. 38. It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of a foreign law. If Scott is freed, by what means will it be effected, but by the constitution of the State of Illinois, or the territorial laws of the United States? Now, what principle requires the interference of this court? Are not those governments capable of enforcing their own laws; and if they are not, are we concerned that such laws should be enforced, and that, too, at the cost of our own citizens? States in which an absolute prohibition of slavery prevails, maintain that if a slave, with the consent of his master, touch their soil he thereby becomes free. The prohibition in the act, commonly called the Missouri Compromise, is absolute. How is that to be interpreted? That act prevails along our entire western boundary; if our courts take upon themselves the task of enforcing the laws of other States, it is nothing but reasonable that they should take them as they are understood where they are promulgated. If a slave passes our western boundary, by the order of his master, and goes into the territory subject to the Missouri Compromise, does he thereby become free? Most of the courts of this Union would say that he does, if his freedom is sought to be recovered under the laws of that territory. If our courts undertake the task of enforcing that act, should they not take it as most of the other States would? Some of our old cases say, that a hiring for two days would be a violation of the constitution of Illinois and entitle the slave to his freedom. If two days would do, why not one? Is there any difference in principle or morality between holding a slave in a free territory two days more than one day? And if one day, why not six hours? The old cases say, the intent is nothing, the act is the thing.

Now, are we prepared to say, that we shall suffer these laws to be enforced in our courts? On almost three sides the State of Missouri is surrounded by free soil. If one of our slaves touch that soil with his master's assent, he becomes entitled to his freedom. Considering the numberless instances in which those living along an extreme frontier would have occasion to occupy their

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slaves beyond our boundary, how hard would it be if our courts should liberate all the slaves who should thus be employed! How unreasonable to ask it! If a master sends his slave to hunt his horses or cattle beyond the boundary, shall he thereby be liberated? But our courts, it is said, will not go so far. If not go the entire length, why go at [* 585] all? The obligation to enforce to the proper *degree is as obligatory as to enforce to any degree. Slavery is introduced by a continuance in the territory for six hours as well as for twelve months, and so far as our laws are concerned, the offense is as great in the one case as in the other. Laws operate only within the territory of the State for which they are made, and by enforcing them here, we, contrary to all principle, give them an extra-territorial effect Chancellor Kent says: "A statute, though not in the nature of a judicial proceeding, is, however, a record of the highest nature. But if a statute, though a matter of record, was to have the same effect in one State as in another, then one State would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow. That construction is utterly inadmissible. While it is conceded to be a principle of public law, requisite for the safe intercourse and commerce of mankind, that acts, valid by the law of the State where they arise, are valid everywhere, it is at the same time, to be understood, that this principle relates only to civil acts founded on the volition of the parties, and not to such as proceed from the sovereign power. The force of the latter cannot be permitted to operate beyond the limits of the territory, without affecting the necessary independence of nations." 2 Kent, 117-8.

This language is used when speaking in reference to the legislation of other States of the Union. It is conceived that there is no ground to presume or to impute any volition to Dr. Emerson, that his slave should have his freedom. He was ordered by superior authority to the posts where his slave was detained in servitude, and in obedience to that authority, he repaired to them with his servant, as he very naturally supposed he had a right to do. To construe this into an assent to his slave's freedom would be doing violence to his acts. Nothing but a persuasion that it is a

duty to enforce the foreign law as though it was one of our own, could ever induce a court to put such a construction on his conduct. The present attitude of the parties to this suit is conclusive, as to an actual consent, and nothing but the foreign law or the aid derived from it, can raise an implied one. If the State of Missouri had prohibited slavery within her limits, and our courts were called upon to execute that law, some zeal might be tolerated in our efforts to execute it; but while slavery obtains here, there is no consideration which would warrant us in going such lengths against our own citizens, for having permitted their slaves to remain in the territory of a State where slavery is prohibited.

In States and Kingdoms in which slavery is the least countenanced, and where there is a constant struggle against its existence, it is admitted law, that if a slave accompanies his master to a country in which *slavery is prohibited, and [* 586] remains there a length of time, if during his continuance in such country there is no act of manumission decreed by its courts, and he afterwards returns to his master's domicil, where slavery prevails, he has no right to maintain a suit founded upon a claim of permanent freedom. This is the law of England, where it is said that her air is too pure for a slave to breathe in, and that no sooner does he touch her soil than his shackles fall from him; the case of slave Grace, 2 Haggard Admiralty Rep. 94. Story, in his Conflict of Laws, says, "it has been solemnly decided that the law of England abhors and will not endure the existence of slavery within the nation, and consequently, so soon as a slave lands in England, he becomes *ipso facto*, a free man, and discharged from the state of servitude; and there is no doubt that the same principle pervades the common law of the non-slaveholding States in America; that is to say, foreign slaves would no longer be deemed such after their removal thither." But he continues, "it is a very different question how far the original state of slavery might re-attach upon the party, if he should return to the country by whose laws he was declared to be and was held as a slave;" sec. 95, 6. In the case of the Commonwealth of Massachusetts v. Ames, 18 Pick., Judge Shaw, although declining to give an express opinion upon this question, intimates very clearly

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that if the slave returns to his former country where slavery obtains, his condition would not be changed. In the case of *Graham v. Strader*, 5 Mon. 183, the court of Appeals in Kentucky held, that the owner of a slave who resides in Kentucky, and who permits his slave to go to Ohio in charge of an agent for a temporary purpose, does not forfeit his right of property in such slave.

An attempt has been made to show, that the comity extended to the laws of other States, is a matter of discretion, to be determined by the courts of that State in which the laws are proposed to be enforced. If it is a matter of discretion, that discretion must be controlled by circumstances. Times now are not as they were when the former decisions on this subject were made. Since then not only individuals, but States, have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of [* 587] the progenitors of those who are *now so sensitive on the subject, ever introduced the institution among us, yet we will not go to them to learn law, morality or religion on the subject.

As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave of the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing with them the blessings of civilized life, we are almost persuaded that the introduction of slavery amongst us was, in the providences of God, who makes the evil

The unjust institution

passions of men subservient to his own glory, a means of placing that unhappy race within the pale of civilized nations.

Judge Ryland concurring, the judgment will be reversed and the cause remanded.

GAMBLE, J., dissenting opinion.

As I am constrained to depart from the opinion given by a majority of the court, the questions involved in the case and the present condition of feeling in the country, seem to require that I should state the grounds of the dissent.

In all ages, and in all countries in which slavery has existed, the slave has been regarded not merely as property, but also as a being capable of acquiring and holding certain rights by the act of the master. He could acquire and enforce his right to freedom in modes recognized by the law of the country in which he dwelt.

In the early English law, where there existed a species of slavery, known as villanage, the villain might be emancipated by his lord, either directly by deed, or by implication of law, from some act of the master recognizing him as a freeman, as by making to him an obligation for a sum of money, or conveying lands to him, or by impleading him in an action. This appears, as well by the text of Littleton as by the commentary of Lord Coke, 1 Just. 137 A. & B. By the Spanish law, 1 Partidas, 587, the mode in which a master may emancipate his slave is prescribed; and at page 589 certain meritorious actions are mentioned, which, when performed by a slave, authorize his emancipation, even against the will of his master. In Justinian's Institutes, Liber. 1 Lit. 5, sec. 1, it is declared that "manumission is effected in various ways, either in the face of the church, according to the imperial constitutions, *or in the presence of friends, or by letter, [* 588] or by testament, or by any other last will. Liberty may also be conferred upon a slave by divers other methods, some of which were introduced by former laws, and others by our own."

In every slaveholding State in the Union the subject of emancipation is regulated by statute, and the forms are prescribed in which it shall be effected. Whenever the forms required by the

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laws of the State in which the master and slave are resident, are complied with, the emancipation is complete and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which he and his former master resided ; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by the laws of the State in which the court is sitting. Take, for example, an emancipation by will. If a master, residing and holding slaves in Missouri, should emancipate them by will, executed and proved, according to our laws, and the slaves thus emancipated should, in the exercise of their freedom acknowledged and enjoyed here, emigrate to another slave State, where emancipation by will was not permitted, there is no person so ignorant as to suppose that they would lose their right to freedom by such change of residence. Decisions of courts might be cited on this point, but it is not necessary to appeal to the tribunals for the maintainance of a principle so perfectly plain.

In all such cases, courts continually administer the law of the country where the right was acquired ; and when that law becomes known to the court it is just as much a matter of course to decide the rights of the parties according to its requirements as it is to settle the title of real estate, situate in our State, according to our own laws.

We, here, are the citizens of one nation, composed of many different States, which are all equal and are each and all entitled to manage their own domestic institutions by their own municipal law, except so far as the constitution of the United States interferes with that power. The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the constitution of the United States gives no power to the general government ; it is left to be adopted or rejected by the several States, as they think best. Nor can any one State, nor any number of States, claim the right to interfere with any other State, upon the question of admit-

ting or excluding this institution. It must be borne *in mind, that this freedom and equality of the different [* 589] States, supposes that each can, of its own will, according to its own judgment, exclude slavery, with as little cause of offense to any of the other States, as if its decision was in favor of admitting it. As citizens of a slaveholding State, we have no right to complain of our neighbors of Illinois, because they introduce into their State constitution a prohibition of slavery; nor has any citizen of Missouri, who removes with his slave to Illinois, a right to complain that the fundamental law of the State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act, as if he had executed a deed of emancipation. Nor can any man pretend ignorance, that such is the design and effect of the constitutional provision. The decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground, that the master, by making the free State the residence of his slave, has voluntarily subjected himself and his property to a law, the operation of which he was bound to know. It would seem difficult to make any sound distinction between the effect of an emancipation produced by the act of the master, in thus voluntarily placing his slave under the operation of such a law, and that of an emancipation produced by the act of the master, by the execution of an instrument of writing in any State where the slave resided, which, according to the law of that State, would be sufficient to discharge the slave from servitude, although it might not be a valid emancipation under the laws of another State.

While I merely glance at the reasons which might be urged in support of the present plaintiff's claim to freedom, if it were an original question, I do not propose to rest my dissent from the opinion given in this case, upon the original reasoning in support of the position.

I regard the question as conclusively settled, by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at

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liberty to overturn them than I would any other series of decisions, by which the law upon any other question was settled. There is with me, nothing in the law relating to slavery, which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it. It is, undoubtedly, a matter to be deeply regretted, that men who have no concern with the institution of slavery, should have claimed the right to interfere with the domestic relations of their neighbors, and have insisted that their ideas of philanthropy and morality should be adopted by people [* 590] who are certainly capable of *deciding upon their own duties and obligations. That the present owners of slaves, when denounced in terms that would be appropriate, if they had actually kidnapped the slaves from the coast of Africa, or had inherited the fortunes accumulated by such iniquitous traffic, should feel exasperated by such wanton and unfounded attacks, is but natural. That alienation of feeling and, finally, settled hostility will be produced by this course of conduct, is greatly to be apprehended. But, in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend.

In this State, it has been recognized, from the beginning of the government, as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave: *Winney v. Whitesides*, 1 Mo. Rep. 473; *Le Grange v. Chouteau*, 2 Mo. Rep. 20; *Milley v. Smith*, *ibid.* 36; *Ralph v. Duncan*, 3 Mo. Rep. 194; *Julia v. McKinney*, *ibid.* 270; *Natt v. Ruddell*, *ibid.* 400; *Rachael v. Walker*, 4 Mo. Rep. 350; *Wilson v. Melvin*, *ibid.* 592. These decisions, which come down to the year 1837 seem to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration until the present. In the case of *Winney v. Whitesides*, the question was made in the argument "whether one nation would execute the penal laws of another," and the court replied in this language: Huberus, quoted in 4

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Dallas, 375, says, 'personal rights or disabilities, obtained or communicated by the laws of any particular place, are of a nature which accompany the person wherever he goes. If this be the case in countries altogether independent of each other, how much more in the case of a person removing from this common territory of all the States to one of the States. An adjudication on those rights, in the country where they accrue, may be evidence of them, but cannot give them. We are clearly of opinion, that if by a residence in Illinois, the plaintiff in error lost her right to the property in defendant, that right was not revived by a removal of the parties to Missouri.'

The principle thus settled, runs through all the cases subsequently decided, for they were all cases in which the right to freedom was claimed in our courts, under a residence in a free State or territory, and where there had been no adjudication upon the right to freedom in such State or territory.

But the supreme court of Missouri, so far from standing alone on this question, is supported by the decisions of the other slave States, including *those in which it may be [* 591] supposed there was the least disposition to favor emancipation. In *Lunsford v. Coquellon*, 2 Martin N. S. 401, the supreme court of Louisiana held, that the removal of a slave by his master from Kentucky to Ohio, with intention to reside there, *ipso facto* emancipates the slave. The same court, in *Marie Louise v. Marot and others*, 9 L. R. 475, and in *Smith v. Smith*, 13 L. R. 441, holds "that the fact of a slave being taken by the owners to the kingdom of France or other country, where slavery is not tolerated, operates upon the condition of the slave and produces immediate emancipation." See, also, *Thomas v. Generis*, L. R. 483; *Josephine v. Poultney*, 1 Annual R. 329. The current of judicial authority in that State was so uniform, that in 1846 an act was passed by the legislature which declared that residence in a country where slavery is prohibited shall not entitle the slave to freedom. Upon this statute, the supreme court, in *Eugene v. Percival*, 2 Annual R. 180, remarks that it settles the law upon the subject, upon the principles laid down by Lord

Stowell, in the case of the slave, Grace, 2 Haggard's Admiralty R. 94.

In *Harry and others v. Decker and Hopkins*, Walker 36, the supreme court of Mississippi held, that any State may, by its constitution, prohibit slavery within its limits, and so may the legislature, when not restrained by the constitution; and that slaves within the limits of the northwest territory became free by the ordinance of 1787, and may assert their rights in the courts of Mississippi.

In *Griffith v. Fanny*, Gilmer's R. 143, the court of appeals of Virginia held, that a negro held in servitude in Ohio was entitled to freedom under the constitution of Ohio.

Judge Mills, in delivering the opinion of the court of appeals of Kentucky, in *Rankin v. Lydia*, 2 A. K. Marsh. 468, maintained the right of a negro to freedom by reason of a residence in Indiana, and considers the question, whether the plaintiff's claim to freedom was of a penal character, because it accrued by the laws of another government, that would not be enforced in Kentucky. The opinion is one of ability, and maintains the right of the negro to assert her claim to freedom in the courts of Kentucky, although there was no actual enjoyment of freedom in Indiana. See, also, *Bush's Reps. v. White and wife*, 3 Monroe, 104.

The cases here referred to are cases decided when the public mind was tranquil, and when the tribunals maintained in their decisions the principles which had always received the approbation of an enlightened public opinion. Times may have changed, public feeling may have changed, but principles have not [* 592] and do not change; and, in my judgment, there can be no safe basis for judicial decisions but in those principles which are immutable.

It may be observed, that the principle is either expressly declared or tacitly admitted in all these cases, that where a right to freedom has been acquired, under the law of another State or community, it may be enforced by action in the courts of a slaveholding State; for, in every one of these cases, the party claiming freedom had not procured any adjudication upon his right in the country where it accrued.

St. Louis Hospital Association v. The City of St. Louis. 15 Mo.

This very brief examination of the questions involved in this case, will show the grounds upon which I hold it to be my duty to declare, that the voluntary removal of a slave, by his master, to a State, territory or country in which slavery is prohibited, with a view to a residence there, entitles the slave to his freedom, and that that right may be asserted by action in our courts under our laws.

So far as it may be claimed in this case, that there is anything peculiar in the manner in which the slave was held in the free country, by reason of his master being an officer of the United States army, it is sufficient to answer that this court, in *Rachael v. Walker*, 4 Mo. Rep. 350, considered the effect of that circumstance, and decided that such officers were not authorized, any more than private individuals, to hold slaves, either in the north-west territory or in the territory west of the Mississippi and north of thirty-six degrees thirty minutes north latitude. The act of Congress, called the Missouri Compromise, was, in that case, held as operative as the ordinance of 1787.(a)

ST. LOUIS HOSPITAL ASSOCIATION, respondent, v. THE CITY OF
ST. LOUIS, appellant.

15 Mo. 592.

Although the city of St. Louis may not have been under any obligation to provide for or maintain the insane within her limits, that being the duty of the county, yet if she employed the plaintiff to do this service, she was on every principle of law and justice bound to make good her contract.

[This case settles no general principle of law, and as the point decided is fully contained in the above syllabus, it is thought unnecessary to give the opinion of the court in full.]

(a) Affirmed, *Sylvia v. Kirby*, 17 Mo. 434.

Calvert v. Steamboat Timoleon. Phillips v. Smoot. 15 Mo.

CALVERT, respondent, v. STEAMBOAT TIMOLEON, appellant.

15 Mo. 595.

The fact that under the ordinance of 1787 a slave was entitled to his freedom cannot be set up as a defense to an action against a steamboat for transporting a slave from the State without the consent of his master, it appearing that the slave had never asserted his right to freedom.

[The legal questions determined by this case no longer having any practical bearing, the opinion of the court is omitted; the principles involved are fully discussed in the Dred Scott case, *ante*. p. 576.]

PHILLIPS, respondent, v. SMOOT, appellant.

15 Mo. 598.

1. If the instructions given, present the case fairly to the jury, their verdict will not be disturbed, notwithstanding instructions, containing correct principles of law, have been refused.(a)

Appeal from Marion Circuit Court.

H. S. LIPSCOMB, for appellant.

[* 599] *ANDERSON & RUSH, *contra*.

RYLAND, J., delivered the opinion of the court.

This was a petition brought in Marion circuit court by Phillips against Smoot, for voluntarily throwing down and leaving down a fence that did not lead into the defendant's enclosure, whereby the cattle of the petitioner escaped, and he was put to trouble and expense in getting them again. The petition is founded on a breach of the statute of this State concerning "trespass," which declares, that if any person shall voluntarily throw down any fence, &c., and leave the same down, not leading into his own enclosure, he shall pay to the party injured the sum of five dollars and double the amount of damages the party shall sustain by rea-

(a) Pond v. Wyman, *ante*. 175, and references.

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son of such fence having been thrown down: Digest of 1845, page 1069.(a)

The defendant filed his answer, denying that the fence he threw down was in the possession of the plaintiff, and stating that the fence was put across the road he usually traveled to town; and that the petitioner had no cattle in the enclosure when he threw the fence down.

The jury found for the plaintiff, and assessed the damages at thirteen dollars and thirty-three cents, single damages. The court therefore rendered judgment for the sum of five dollars, the statutory penalty, and for twenty-six dollars and sixty-six cents double damages. Motions were made in arrest of judgment and for a new trial, which were overruled, and the defendant brings the case to this court by appeal.

In looking into the bill of exceptions, we find some instructions asked *for and refused, and others given. [* 600] It is deemed unnecessary to notice those refused, for the instructions given put the case fairly before the jury, and their verdict, warranted by the evidence, will not be disturbed.

Taking the facts set forth in the answer in this case as fully proved, they will not amount to a defense sufficient to bar the plaintiff's action.

The judgment below is affirmed, the other Judges concurring.

BOURNE, Clerk of Hannibal Court of Common Pleas, respondent,
v. COUNTY COURT OF MARION COUNTY, appellant.

15 Mo. 600.

Hannibal Court of Common Pleas.—By the 35th section of the act creating the Hannibal court of common pleas (private acts 1845, page 66), all expenses incurred in the establishment of the court, must be paid by the citizens within the corporate limits of the city. A record book furnished by the clerk, for the use of the court, is a part of the expenses incurred in the establishment of the court, and the county of Marion is not bound to pay for it.

(a) Gen'l Stat. of 1865, chap. 76, § 2; Wagner's Stat. p. 1345.

Bourne v. The County Court of Marion County. 15 Mo.

Appeal from Marion Circuit Court.

A. LAMB, for appellant.

RICHMOND, *contra*.

RYLAND, J., delivered the opinion of the court.

The question in this case involves the liability of the county of Marion to pay for the record books, procured for his office by the clerk of the Hannibal court of common pleas; and we must look to the provisions of the act creating this court, for the solution.

The statute creating the Hannibal court of common pleas (see private acts 1845, page 66), contains, among others, the following provisions:

Sec. 22. "There shall be a clerk of the court hereby established, who shall possess the qualifications of a clerk of a circuit court; he shall be elected in the same manner, and for the same term, and all vacancies in his office shall be supplied in the same manner as in cases of a clerk of a circuit court."

Sec. 23. "Such clerk shall take the like oath, give [* 602] the like bond, be *governed by the same laws and perform the like duties in relation to the business of the court and his office and the record and proceedings appertaining thereto, as clerks of the circuit court, and with like accountability; he shall receive for his services the fees prescribed by law for clerks of the circuit courts in like cases."

Sec. 24. "The act regulating clerks, approved thirteenth day of February, eighteen hundred and thirty-five, and all other laws relating to the clerks of the circuit courts and their securities, shall be construed to extend to the said clerk of the court of common pleas and his securities, to all intents and purposes as if they had been expressly included therein, unless otherwise provided for in this act."

Sec. 35. "All expenses which may be incurred in the establishment of said court of common pleas, shall be paid by the citizens within the corporate limits of said city of Hannibal."

The court established by the above-mentioned statute is made

a court of record. Books, in which the proceedings of the court can be recorded, are necessary to its establishment; and the expenses incurred in obtaining such books are consequent upon the establishing of the said court. Such expenses, by the terms of the statute, must be paid by the citizens within the corporate limits of the city of Hannibal. So must all such expenses that may be incurred for any such books in future, they being necessarily incurred by the establishing of the said court.

The other Judges concurring, the judgment of the circuit court will be reversed and this cause remanded for further proceedings, in accordance with this opinion.

DRAHER, plaintiff in error, v. SCHREIBER, defendant in error.

15 Mo. 602.

1. An instrument drawn as follows: "Mr. Emanuel Folker can, upon this my order, at any time, receive from my kiln, sixty-three dollars in lime," dated and signed, is a promisory note "for property," within the meaning of the 2d section of the act concerning bonds and notes (Revised Statute, 190), and is assignable, under that section, so that the assignee may maintain an action thereon in his own name.

Error to St. Louis Circuit Court.

STATEMENT OF THE CASE.

The plaintiff, Draher, sued the defendant in the Law Commissioner's Court, on the following instrument: "Mr. Emanuel Folker can, upon this my order, at any time receive from my kiln sixty-three dollars in lime. St. Louis 26th April, 1848." (Signed) "John Schreiber." On which was the following assignment: "Mr. J. Schreiber, have the good to let Mr. John Draher have said lime. Emanuel Folker." The plaintiff averred, that he had demanded at defendant's kiln the amount of lime due on said order, after allowing all just credit from John Schreiber, the defendant, and said Schreiber refused to deliver the same or any part thereof, to the plaintiff's damage of seventy dollars.

The defendant made the following motion, in the Law Commissioner's Court, which was there overruled. "And now comes John Schreiber and pleads, and says that the order, on paper or account filed in this cause, shows no legal interest in the plaintiff, nor has the plaintiff any right to sue thereon; the same from its nature and character, not being assignable, the legal right to sue, if any cause of action exists, being in

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- Emanuel Folker ; wherefore the defendant, John Schreiber, prays judgment.

Judgment was given in the Law Commissioner's Court for the plaintiff. Defendant appealed to the St. Louis Court of Common Pleas, where he renewed the above motion, which was sustained by the court and the case dismissed, to which plaintiff then and there excepted, and brings the case to this court on writ of error.

GIBSON, for plaintiff in error.

GAMBLE, J., delivered the opinion of the court.

The instrument upon which this suit is founded is a promissory note "for property," within the meaning of the 2nd section of the act concerning bonds and notes, Revised Code 190, and is assignable under that section, so that the assignee may maintain an action thereon in his own name.(a)

The court below erred in sustaining the motion to dismiss the suit, and its judgment is reversed and the cause remanded.

MARION COUNTY, defendant in error, v. MOFFETT, Adm'r of Samuels, plaintiff in error.

15 Mo. 604.

1. *School fund.*—The failure of the county court to take a mortgage on unincumbered real estate to secure the payment of a bond given for school money loaned, does not discharge the surety in such bond.
2. *Agent—Laches.*—The State is not affected by the laches of her agents.

Error to Marion Circuit Court.

H. S. LIPSCOMB & A. W. RUSH, for plaintiff in error.

A. W. LAMB, *contra*.

[* 605] *SCOTT, J., delivered the opinion of the court.

This was an action begun in the county court of Marion county by the defendant in error against the plaintiff in error, for the

(a) This section is omitted in the General Statutes of 1865.

recovery of a debt due the defendant in error for school money loaned to E. McDonald, for whom the intestate of the plaintiff in error was a surety. Judgment was recovered in the county court, whence the case was transferred to the circuit court, where judgment was again rendered for the defendant in error, upon which the plaintiff in error sued out this writ.

It appears that Jameson Samuels, the intestate, together with W. B. Bebee, was surety in a bond for \$1200, executed by E. McDonald to the county of Marion for school money. The bond was executed on the 19th day of January, 1842, and was secured by a mortgage on a tract of land to which McDonald was entitled but to one undivided half, and which had been previously conveyed by him in 1840, in trust to pay his debts, and which afterwards, in November, 1842, was sold under the trust. The court instructed the jury, that the fact that McDonald had not a clear and perfect title to the land mortgaged to secure the debt, did not discharge the surety; to which instruction the plaintiff in error excepted, and now maintains its impropriety as a reason for reversing the judgment of the court below.

The 11th section of the 2nd article of the act to provide for the organization *and support of common schools, [* 606] passed February 9th, 1839, enacts, that if the sum to be loaned exceed one hundred dollars, the court shall require in addition to bond and personal security, a mortgage in fee, on real estate, free from all liens and incumbrances within the county, equal in value to double the amount of the loan.(a)

The school lands were vested in the State, in trust for the benefit of the inhabitants of the township in which they are respectively situated. The State vested in the county courts the management of this trust. Those courts are the agents of the State for this purpose. The principle, that the State is not affected by the laches of her agents, was sanctioned by this court in the case of *Park v. State*, 7 Mo. Rep.

The doctrine, that laches is not imputable to the government, is founded on considerations of policy. The State can only act

(a) Gen'l Stat. of 1865, chap. 46, § 67; Wagner's Statute, p. 1256.

through her officers, and her transactions are so multiplied and her agencies so numerous, that great losses must result from maintaining that she is liable for the laches of those to whom she is compelled to entrust the management of her pecuniary concerns. The provisions of the law above cited were intended only for the regulation of the conduct of the officers to whom was confided the care of the school monies and to secure those monies from loss. They are merely directory and form no part of the contract with the surety. The surety has the same means of forming a judgment of the fidelity of the public agents as the State, and if he reposes confidence in them and is deceived, he cannot expect that the consequences of their neglect shall be visited on the State. The case of the People v. Johnson, 7 J. R., relied on by the plaintiff in error, has been overruled.

The other Judges concurring, the judgment will be affirmed. (a)

STATE, respondent, v. HALE, appellant.

15 Mo. 606.

1. *Practice—Criminal*.—Under an indictment for practicing medicine without license, the State is not required to prove the actual receipt of compensation by the defendant.
2. *Practice—Criminal—Jury*.—An indictment for misdemeanor may, by consent of parties, be tried by a jury of less than twelve.

M. FRISSELL, for appellant.

J. R. LACKLAND, *contra*.

RYLAND, J., delivered the opinion of the court.

This was an indictment against the defendant for practicing medicine without license, in violation of the act "to sustain the credit of the State," passed 16th February, 1847.

[* 608] *The indictment contained two counts. The defendant demurred to it. His demurrer to the second count was

(a) St. Charles Co. v. Powell, 22 Mo. 528.

sustained, and to the first was overruled. He then plead not guilty. Upon the trial of this issue, the jury found him guilty and assessed his fine at fifty dollars, the penalty fixed by the act aforesaid.

Upon the trial, the defendant asked the court to instruct the jury "that unless they believed from the evidence, that the defendant received compensation for his services as a physician, they must find him not guilty." The court refused this instruction, and instructed, "that unless the jury believe from the evidence, that the defendant practiced medicine for compensation and reward, then he is not guilty, but the State is not required to prove the actual receipt of such compensation."

The defendant excepted to the giving of this instruction, and also to the refusing to give the one asked for by him.

The ruling of the court below, in regard to these instructions, is the main point presented for the consideration of this court. "No person or co-partnership of persons shall follow the practice of law or medicine, in whole or in part as a business, in this State, without first obtaining license to follow such profession, according to the provisions of this act:" See 8th section of the act aforesaid.

The first count of the indictment charges, that the defendant did practice medicine in Washington county aforesaid, as a business, and avers, that he thus practiced by giving and prescribing physic and medicine to divers persons and families, naming them.

There was no proof that he received any compensation for his practice, and the failure of this proof is the principal ground of defense.

The instruction given by the court, requires the jury to believe from the evidence, before they are authorized to convict, "that the defendant did practice medicine for compensation and reward; but also informed them, that the State was not bound to prove the actual receipt of such reward or compensation." This is the proper exposition of the offense under the statute, and this brought before the jury the necessary acts to be done, before they could convict. The instruction given, then, was the proper one. There is no error in refusing the defendant's instruction, nor in giving the one above by the court.

Wilkerson v. Moulder. 15 Mo.

There is nothing in the point, that the jury consisted of eleven jurors only; this was agreed to at the time, by the parties. (a) The indictment seems to have been drawn without much attention, in a careless and hasty manner, but it is considered, nevertheless, to be substantially good.

The other Judges concurring, the judgment below is affirmed.

WILKERSON, plaintiff in error, v. MOULDER, defendant in error.

15 Mo. 609.

Ejectment—Evidence.—In an action of ejectment, it is competent for the plaintiff to prove that the defendant, at the time he executed a deed relied on by the plaintiff, stated that the land conveyed, was the same on which the defendant then lived.

Error to Mississippi Circuit Court.

J. D. COOK, for the defendant in error.

SCOTT, J., delivered the opinion of the court.

This was an action in the nature of an ejectment, brought by the plaintiff to recover possession of a tract of land, in which the defendant obtained judgment, to reverse which this writ of error is sued out.

- The defense amounted to the general issue, and on the trial, in support of his action, the plaintiff read in evidence a deed from the defendant to him, conveying the land described in his declaration. He then introduced a subscribing witness to the deed, by whom it was proposed to prove that the defendant stated at the time of the conveyance, that the land conveyed was the same on which he then lived, and who further proved that the defendant had continued to reside on the same land from the sale thereof until the time of trial. The testimony offered was excluded by the court, to which an exception was taken, and judgment was rendered for the defendant.

(a) But on a trial for felony such an agreement is a nullity; see *State v. Mansfield*, 41 Mo. 470.

Lambar v. The City of St. Louis. 15 Mo.

It is impossible to conjecture the reason for excluding the evidence offered by the plaintiff. There being no variance between the deed conveying the lands and the declaration describing them, it was only incumbent on the plaintiff to show their identity with the land possessed by the defendant. It was clearly competent for the plaintiff to use the defendant's declarations as evidence of this fact, if he saw proper. The declarations of an adversary are admissible on every principle. The weight of the admission would seem sufficient to establish the fact of identity. We may presume that when one speaks of the township, *range, [* 610] section and subdivision of the section on which he resides, he has correct information on the subject.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

LAMBAR, respondent, v. THE CITY OF ST. LOUIS, appellant.

15 Mo. 610.

Municipal corporation—Damages.—A municipal corporation is not liable for damages consequent upon digging a ditch by its authorized agents in pursuance of an ordinance of the corporation, when the work is not carelessly or negligently done.

J. C. RICHARDSON, City Counselor, for appellant.

L. COOKE, *contra*.

RYLAND, J., delivered the opinion of the court.

This case presents such points, principally, as have been already decided by this court in the cases of *Gurno v. the City*; (a) *Taylor et al. v. the City*, (b) and *Hoffman v. the City*. (c)

The following is the agreed case: [612]

“The plaintiff, Lambar, built and occupied a two-story brick

(a) 12 Mo. 414.

(b) 14 Mo. 20.

(c) *post*. p. 651.

house, on the premises described in his petition, worth fifteen dollars per month renting. That Carroll street, upon which said house fronts, was a public street, but has never been paved or graded, or in any manner improved or altered, save as hereafter mentioned. That about from one to five years ago, the city of St. Louis, by her proper agents, under her ordinance, cut a ditch on the north side of Carroll street (and the north side thereof was about eight or ten feet from the plaintiff's house), for the purpose of conducting the water, which had previously accumulated in that part of the city, from the south and west of Seventh street, through said ditch in Carroll street; which water would otherwise flow from Seventh street towards Carondelet avenue, and distribute itself through various streets running east and along said streets (Carroll street principally, as one) to the Mississippi river. That said ditch, by the operation of the collection and flow of water, was widened to the width of ten or twelve feet, which prevented the plaintiff from using or renting his house to the same advantage, that he could have done if the ditch had not been cut, as above stated; and that the loss amounted to at least one hundred and fifty dollars. That the plaintiff put a dam across the ditch, to fill up the same, about two years ago, which was removed by one Guibord, under the authority of the defendant, and the ditch made free and unobstructed, as before."

The law commissioner, before whom this case was tried, gave one instruction for the plaintiff and two for the defendant, and one on its own motion.

The instructions given do not touch the agreed case. The one for the plaintiff refers to the character and authority of the person doing the work, the proper officer; and the one on the motion of the commissioner himself puts the case on the negligence of the city authorities in constructing the work and in keeping it so that it should cause no injury to the persons living near it. Neither of these instructions have any foundation on which to rest, and are both wrong.

From the agreed case, it seems that the ditch was dug by the city, by her proper authorized agents, under her proper ordinances. It does not appear how wide it was when first dug, or how deep;

Draper, to use of Clifton, v. Owsley.

whether it was carelessly kept, or carelessly and negligently managed by the city authorities, after it was dug. There is nothing from the agreed case by which the city can be made liable under the principles in the cases heretofore decided by this court.

We cannot go beyond the facts as found in the agreed case, and if *such facts do not constitute the liability of [* 613] the defendant the plaintiff should not recover.

We do not pretend to say but that for neglect or unskillfulness and mismanagement in constructing public improvements, that there might be cases presented, in which the city's liability would be manifest; but we are not authorized to make presumptions of facts, upon an agreed case. We take the facts as found, as agreed, and suppose they are all the facts in relation to the matter in controversy. (a)

Under this view, then, the court below erred. The city is not liable upon such a state of case.

The judgment below is reversed, the other Judges concurring.

DRAPEK, to use of Clifton, respondent, v. OWSLEY, appellant.

15 Mo. 613.

Compromise.—One who, with a knowledge of all the facts, compromises a suit, and gives his note in accordance with the terms of the compromise, cannot when sued on such note set up a defense which he might have interposed to the original suit.

RICHMOND, HARRISON & HAWKINS, for appellant.

*LAKENAN, *contra*.

[* 615]

RYLAND, J., delivered the opinion of the court.

From the above statement it will be seen, that the question for the consideration of the court involves the liability of Owsley to pay the notes executed by him to Draper for Clifton, upon the compromise of the suit first brought against Owsley.

(a) St. Louis v. Clemens, 36 Mo. 472.

Draper, to use of Clifton, v. Owsley. 15 Mo.

Owsley was security to Shropshire in a note for the payment of money to one Conway, upon a contract between Conway and the "Hannibal Company" of which said company Shropshire was a member. This note was assigned to T. G. Draper, Secretary of the "Hannibal Company;" upon the dissolution of the [* 616] company, Shropshire having *previously sold out his interest, the note of Shropshire and Owsley fell to the share of Clifton, and was assigned to him by Draper. Some years after the maturity of this note, suit was commenced upon it by Clifton against Owsley. This suit was compromised by Owsley and Draper, the agent for Clifton; Owsley giving his notes and time, for a less sum than the original debt, to Draper for Clifton, and Draper dismissing the suit. One of the notes given on this compromise, is the foundation of the present action.

The defendant contends, that as this suit was commenced before a justice of the peace, he can avail himself of any defense which either law or equity can afford him, and consequently, as he supposes he might have made a successful defense against the original suit brought by Clifton against him, that he is still entitled to go behind the compromise and now assert this same defense to these new notes.

The defendant knew all the facts and circumstances of the transaction; and having made a compromise, by which he has the suit against him dismissed, by giving his note for a less sum and obtaining time thereon, he is bound by these notes and cannot go behind the compromise for defense he ought to have made against the original note. He is concluded by his own compromise; it was fairly made with knowledge of all the facts; let him then abide by it.

But take it for granted that he could make this defense, what does it amount to? Will the facts set forth by him exonerate him from the liability as Shropshire's security to Conway? He contends, that as the "Hannibal Company," of which Shropshire was a member, could not sue Shropshire, therefore the security is exonerated. He assumes the fact to be, that the company could not sue on the note. This may be true, as regards a court of law; but is it certain that Draper could not sue as assignee,

regarding the words "Secretary of Hannibal Company" as mere *descriptio personae*?

If the defendant, Owsley, really supposed that no suit could have been maintained on the note of himself and Shropshire, he should have put that matter to the test, by giving the notice to sue, allowed by our statute to securities.(a)

It is the opinion of this court, that the facts relied on by the defendant, do not constitute a valid defense to this action.

The judgment of the court below, with the concurrence of the other Judges, is affirmed.

HAMILTON, appellant, v. JEFFRIES, respondent.

15 Mo. 617.

Forcible Entry and Detainer—Appeal.—In an action of forcible entry and detainer, if on appeal the affidavit and recognizance are defective the appellant has a right to file sufficient ones, within such time as will not delay the other party.

Appeal from Franklin Circuit Court.

STEVENSON, for appellant.

KENNETT, *contra*.

RYLAND, J., delivered the opinion of the court. [618]

In the foregoing statement, the refusal of the court below to permit the appellant to perfect his appeal, by filing a sufficient affidavit and recognizance, is relied upon for the reversal of judgment below.

This is an action of forcible entry and detainer. The plaintiff, before the justice of the peace, obtained judgment; the defendant prayed an appeal to the circuit court. After the case was carried to the circuit court and the transcript filed, a motion was made to dismiss the appeal for want of a sufficient affidavit and recogni-

a) Gen'l Stat. of 1865, chap. 92, §§ 1-3; Wagner's Stat., pp. 1302-3.

zance. Before this motion was decided, the appellant moved for leave to file a sufficient affidavit and recognizance. The court refused the appellant's motion, but sustained the motion of the plaintiff, and dismissed the appeal for want of affidavit and recognizance.

This action of the circuit court is erroneous, and for it the judgment must be reversed. The 29th and 30th sections of the statute concerning forcible entry and detainer, Digest of 1845, obviously regard the circuit courts as having the power to make orders to have the record and proceedings before the justice perfected in relation to appeals, to have a good and sufficient [* 619] affidavit and recognizance made in the *circuit court; and the 27th section declares that no appeal shall be dismissed for any informality, insufficiency or imperfection in the affidavit or recognizance, if a sufficient affidavit or recognizance be filed within such time as shall not delay the other party.(a)

It was once the practice for the circuit courts to dismiss appeals, where there was no affidavit or recognizance, or an insufficiency in either, or where there was a failure to give notice; but this practice has long since been abandoned. The statutes of the State require a different practice. The practice now is, to disregard any technical or even substantial objection, and to have the cause tried anew in the court to which the appeal is taken. Justice is greatly promoted by this last course of practice, and under the influence of such practice the court below should have permitted the appellant to file his sufficient affidavit and recognizance. The court did not err in permitting the transcript to be filed, of which the plaintiff below complained. But for the refusal to permit the appellant to file a sufficient affidavit and recognizance, and for dismissing the appeal, the judgment below is reversed, and the cause remanded, the other Judges concurring.

(a) Gen'l Stat. of 1865, chap. 188, §§ 27, 29, 30; Wagner's Stat., pp. 652-3.

Froust v. Bruton, Adm'r of Lee. 15 Mo.

FROUST, respondent, v. BRUTON, Adm'r of Lee, appellant.

15 Mo. 619.

Practice.—Default.—A defendant, having permitted judgment by default to go against him, has no right, on an inquiry of damages, to offer any evidence in denial of the plaintiff's right of action. The default admits the plaintiff's right of action.

Appeal from New Madrid Circuit Court.

RYLAND, J., delivered the opinion of the court.

The plaintiff filed his petition in the New Madrid circuit court against the defendant William P. Bruton, administrator *de bonis non* of the estate of Squire Lee, deceased, charging that the intestate Lee, in his lifetime, entered upon a certain tract of land belonging to the *petitioner, and that he [* 620] took and carried away certain houses and house-logs to the value of thirty dollars; and also took and carried off two thousand rails, worth twenty-five dollars, and that he cut down and carried off house-logs to the value of ten dollars.

The defendant failed to appear and answer, and judgment was taken by default against him, and a writ of inquiry of damages awarded, returnable at the succeeding term of the court.

The defendant afterwards moved to set aside the judgment by default, but his motion was overruled.

At the subsequent term, the plaintiff proceeded to have the writ of inquiry executed, and offered evidence to the jury of the value of the house-logs and rails which had been taken off; the defendant objected to this evidence, because the writ of inquiry was not executed at the same term the default was had; alleging that it could not be executed now, because a full term had intervened between the default and the inquest. The plaintiff showed an order of court continuing all cases not otherwise disposed of, and defendant's objections were overruled, and he excepted. The plaintiff then proved the value of the house-logs and the rails which had been taken off, the rails having been put up in a fence. The defendant offered to prove that the fence did not belong to the plaintiff. The plaintiff objected, and the court sustained the

objection, and the defendant excepted. The defendant offered also to read in evidence a transcript of the record and proceedings of a suit before a justice of the peace, in which the trespasses complained of in this action had been adjudicated between the plaintiff and the defendant's intestate, in his lifetime, which was objected to, and ruled out by the court, to which the defendant excepted. The jury assessed the plaintiff's damages at fifty dollars.

The defendant moved an arrest of judgment, assigning as reasons:

1st. That an administrator cannot be sued for a trespass committed by his intestate, as alleged in plaintiff's petition.

2d. That the court erred in rendering judgment by default in this cause against the defendant for the same reason. This motion being overruled, the defendant brings the case here by appeal.

The new code of practice provides, that where there is no answer in cases not founded on bond, bill, or note for money, the plaintiff may have a jury if he require it to assess his damages: See art. 12, sec. 2d, Code of Practice, 1849. There is nothing requiring the assessment of damages to be at the same term of the default; nothing prohibiting the court from having the damages found by writ of inquiry, at a subsequent term.

[* 621] *The defendant's evidence, showing that the fence did not belong to the plaintiff, and the trespass had been formerly adjudicated, was properly refused by the court. This evidence was not in mitigation of damages, it was denying the plaintiff's right of action which has already been admitted by default. (a)

The act concerning administrators, article II, section 25th, declares: "For all wrongs done to the property, right, or interest of another, for which an action might be maintained against wrong doers, such action may be brought by the person injured, or after his death by his executor or administrator, against such wrong doer, and after his death against his administrator or executor in

(a) Robinson v. Lawson, 26 Mo. 69; Barclay v. Pickles, 38 Mo. 143.

the same manner and with the like effect in all respects as actions founded upon contract. (a)

This statute fully sustains the right of the plaintiff to maintain an action against the administrator of one who has, in his lifetime been guilty of the wrong to the property, rights or interests of the plaintiff.

The motion in arrest of judgment was therefore properly overruled.

The other Judges concurring, the judgment below is affirmed.

MURRAY, plaintiff in error, v. LAFTEN *et al.*, defendants in error.

15 Mo. 621.

Evidence—Record.—Where the transcript of an execution issued by a justice of the peace and the constable's return of *nulla bona* thereon has been filed in the office of the clerk of the circuit court, the validity of the execution issued thereon by the circuit court cannot be impeached in a collateral proceeding by showing that the transcript so filed varies from the original execution and return thereon. (Coonce v. Munday, 3 Mo. 374, modified.)

Error to St. Louis Circuit Court

F. P. BLAIR, JR., for plaintiff in error.

*M. L. GRAY, *contra*.

[* 623]

GAMBLE, J., delivered the opinion of the court.

Judgments were recovered against Miller, the owner of the property in question, before a justice of the peace, and transcripts of the judgments, including executions thereon and the constable's returns of *nulla bona* upon the executions, were filed in the office of the clerk of the circuit court in May, 1844. Executions issued from the circuit court upon these judgments, and the property was sold and conveyed by the sheriff to the plaintiff.

Upon the trial of the present action the plaintiff gave in evidence the transcripts from the justice of the peace, the execu-

(a) Gen'l Stat. of 1865, chap. 121, § 29; Wagner's Stat., p. 87.

utions from the circuit court, and the sheriff's deed for the property. The defendants introduced the justice of the peace, who produced certain papers which he testified were the original executions in the cases before him against Miller; and, upon inspection of these papers, they appeared to be returnable in sixty days from their date, although the sums recovered in the [* 624] *several judgments were each above one hundred dollars.

The transcripts of executions which were filed in the clerk's office showed the executions to be returnable in ninety days from their date, and the justice testified that this was a mistake in copying the executions, when the transcripts were about to be filed. The papers thus produced by the justice were given in evidence, although the plaintiff objected both to the testimony of the witness and to the papers being received in evidence.

The evidence being before the court an instruction was given that the plaintiff could not recover.

The questions to be determined depend upon the admissibility and effect of the evidence given by the defendants.

It was decided in *Coonce v. Munday*, 3 Mo. Rep. 374, that where the party obtaining a judgment before a justice of the peace filed a transcript of the judgment in the clerk's office, and obtained an execution upon which the real estate of the defendant was sold, the party claiming under such sale must prove, on the trial of an ejectment for the property, that an execution had been issued by the justice and had been returned *nulla bona*, before the execution issued from the circuit court. In that case it is stated "that it did not appear by the transcript filed that any execution had been issued by the justice before the execution issued from the circuit court." In the present case a different state of facts exists. Here, the transcripts from the justice show executions issued in regular form by the justice, and returned *nulla bona*, although the returns were made before the return day.

If the testimony of the justice and the papers offered as the original executions, were admissible, and if it was competent to question the validity of the execution issued by the justice, then the case of *Stevens v. Chouteau*, 11 Mo. Rep. 384, would sustain the position taken by the defendant below, and maintained

by the court, that the executions having been made returnable in sixty instead of ninety days from their date, were void.

It is to be observed that the justice's execution constitutes no part of the title of a purchaser who buys under an execution issued from the circuit court. The process of the circuit court executes the judgment of the justice, and the prohibition against issuing an execution from the circuit court until an execution shall have been issued by the justice, and returned *nulla bona*, requires that the evidence that such execution had issued and been returned shall exist in the office of the circuit court. This is understood to be the proper construction of the law of 1835; Revised Code 365; because, when the transcript of the judgment has *been filed, the statute provides that "the judgment shall [* 625] be equally under the control, and shall be carried into execution in the same manner, and with like effect, as the judgment of the circuit court; and then immediately follows the language restraining the issuing of an execution until one has been issued by the justice and returned. It is the natural meaning and force of this provision, that the court which is to execute the judgment shall possess the whole evidence on record, upon which its process is to issue, so that it may, in the exercise of the control given by the statute, act upon and restrain the process required to be issued. It is true, that the court, in *Coonce v. Munday*, intimate a doubt whether it is the duty of the clerk, before issuing an execution upon the judgment of a justice, to ascertain whether an execution has previously been issued by the justice; but it is rather surprising, that such doubt should be expressed when so much importance is given to the fact, that the party had not produced the evidence that such execution had issued. If it be a fact affecting the legality of the execution from the circuit court, that one had not been previously issued and returned before the justice, and having such effect that property sold under the execution from the circuit court did not pass to the purchaser, then, surely, it is necessary that the court should be possessed of the document which is necessary to the validity of its own process. Again, the principal object in filing these transcripts is to reach the real estate of the defendant, and it is not to be tolerated that the evidence upon

which the validity of the execution and title to the property is made to depend, shall be hunted for through the loose, neglected and scattered papers of some justice in some remote township at a period when it would be difficult to trace either him or his papers. It may then be assumed to be the intention of the legislature, in this enactment, that the evidence that an execution had been issued and had been returned before the justice, is to be filed in the office of the clerk of the circuit court.

The purchaser who takes title under the process of the court, if he looks to, or is bound to look to, the records of the court, for the foundation of the execution, finds a judgment which authorizes the execution, and he finds that an execution has been issued and returned before the justice, he takes the title by his purchase, subject only to such objections that show that the proceeding is a mere nullity. If in this case the execution of the circuit court was not a nullity, the title passed by the sale under it, and is not affected by facts which would have authorized the court to quash it. The transcript on file showed the judgment of the justice and an execution issued in due form of law, and the return of the constable in the form required by the statute, but made [* 626] *within the time allowed for the return of the execution.

If this transcript was true in all its parts, the only objection that could be made to it was, that the execution was returned some few days before the return day. The case cited from 1 Coke 512, which is the same in 7 Comyn's Digest, 285, E. 3, is a case of an action brought against bailiffs for a false return upon a fieri facias, made before the return day of the writ, and it was held that they were not liable to the action because the return was a void return. This, it will be observed, was a question between the plaintiff in the execution and the officers, and involved the question whether the officers had made themselves liable to the plaintiff by the act of returning the writ. It was directly between the parties interested in the return and seems to have but little application to a case in which a purchaser is introduced who does not even claim under the execution.

It cannot be necessary to refer to the multitude of cases in which the law has been declared, that the purchaser has no concern in

any question affecting the validity of the proceedings under which he claims, unless the defect be such that the proceeding is a nullity. The Supreme Court of the United States held, in *Blaine v. The Ship Charles Carter*, 4 Cranch, 332, in relation to executions said to have been issued before the day when, by said law, they could regularly be issued, that "if irregular, the court from which they issued ought to have been moved to set them aside; they were not void because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued." In the present case, the circuit court had full power to vacate its own process, if irregularly issued upon the judgment of the justice, and before that tribunal the objections now made might have been availing, if made in proper time.

It is the opinion of the court, that the party seeking to avail himself of the powers of the circuit court to enforce the judgment of a justice of the peace, should file in the office of the clerk a transcript of the judgment, in order to have a lien on the real estate of the defendant, and a transcript of the execution and constable's return when he wishes to take out execution from the circuit court. While this is understood to be the proper course, under the statute, it is not designed to assert that the process of the circuit court will be void, if the transcript of the justice's execution and constable's return is not filed in the clerk's office, but if it is so filed, then the validity of the circuit court execution cannot be impeached in any collateral proceeding, by showing that the transcript so filed varies from the original execution and return, or, that the original execution or return is void. It is also the opinion of the *court, that the objection now [* 627] taken to the process of the circuit court on account of the constable's return to the execution before the justice, is not available in this action. The evidence, then, given by the defendant was improperly admitted, and when admitted did not authorize the instructions given by the court.(a)

It will be seen, that it is here intended to modify the opinion given in the case of *Coonce v. Munday*, and to bring the proceed-

(a) *Huff v. Knapp*, 17 Mo. 419.

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ings under these judgments, into something like conformity to the general provisions of the laws by which the title to real estate is affected.

The judgment is reversed and the cause remanded.

SAPINGTON, respondent, v. JEFFRIES, appellant.

15 Mo. 628.

1. *Pleading—Answer.*—A general averment, by a defendant, that he does not owe the money sued for, or any part thereof, is not sufficient under the new code; he must answer the plaintiff's petition, by stating the facts upon which he relies.
2. *Surety—Notice.*—A verbal notice by a security to the person having the right of action to sue the principal debtor is not sufficient; it must be in writing.^(a)
3. *Surety—Service of notice.*—Nor is it sufficient to serve such notice on the agent or attorney of the person having the right of action.

Appeal from Franklin Circuit Court.

C. JONES, for appellant.

[* 630] *KENNETT, *contra*.

RYLAND, J., delivered the opinion of the court.

The question in this case involves the propriety of the ruling of the court below, in sustaining the motion of the plaintiff to strike out the defendant's answer.

The defendant's counsel contends that the answer was good and sufficient, and that the court erred in sustaining the motion to strike it out. He contends that it is a good defense, for a security in a note to show that he gave verbal notice to the plaintiff's agent or attorney to sue on the note, and that the agent neglected or failed to sue.

The answer in this case sets forth no facts, amounting to a

(a) The case of Bolton v. Lundy, 6 Mo. 46, was decided under the statute of 1835.

defense in law, to the plaintiff's petition. The defendant's facts might all have been admitted, and still they would not have entitled him to a judgment.

The general averment that he did not owe the money sued for, or any part thereof, is not sufficient under the new code; he must answer the plaintiff's petition by stating facts. He will not be permitted to plead generally, *nil debit*, on assumpsit. His answer must state the facts which he relies on as a defense to the petition of the plaintiff. (a)

The statute authorizing any person bound for another, in any bond, bill or note, for the payment of money, or property, as security, to give notice to the person having the right of action, forthwith to commence suit against the principal debtor, and other parties liable, requires the notice to be in writing; and the service of the notice to be on the person having the right of action on the instrument, personally, or by leaving a copy at his usual place of residence, with some white person of the family over the age of fifteen years. (b)

The notice spoken of in the answer, was a verbal notice; it was given to the attorney or agent of the plaintiff, and because he was *prudent or cunning enough to make no [* 631] objection to the notice, the defendant takes it for granted that he accepted it as sufficient. He was not the person upon whom notice to sue was to be served, in order that upon a failure to exonerate the security, under the terms of the statute.

The security is held strictly to pursue the terms pointed out by the statute, before he can be discharged. (c) The answer of the respondent was, in the opinion of this court, properly stricken out. No better mode is perceived to get clear of an answer, failing

(a) *Barley v. Cannon*, 17 Mo. 595; *Engler v. Bates*, 19 Mo. 543; *North v. Nelson*, 21 Mo. 360; *Cashman v. Anderson*, 26 Mo. 67; *Dare v. Pacific R. R.*, 31 Mo. 480; *B'k of Mo. v. Smith*, 33 Mo. 364; *Mechanic's B'k v. Klein*, *id.* 559; *Phillips v. Evans*, 38 Mo. 305; *Lee v. Casey*, 39 Mo. 383.

(b) Gen'l Stat. of 1865, chap. 92, §§ 1-3; *Wagner's Stat.* pp. 1302-3. See, also, *Freleigh v. Ames*, 31 Mo. 253.

(c) *Lockridge v. Upton*, 24 Mo. 184. But the notice need not pursue the very words of the statute; *Rowton v. Lacy*, 17 Mo. 399; *Christy v. Horne*, 24 Mo. 242.

Withers, to use of Maddox, v. Shropshire. 15 Mo.

entirely to show a defense to the action. To strike it out is the shortest and the quickest mode.

The judgment below is affirmed, the other Judges concurring.

WITHERS, to use of Maddox, appellant, v. SHROPSHIRE, respondent.

15 Mo. 631.

Husband and Wife—Attachment—Interplea.—In an action by attachment against the husband, the wife cannot appear by next friend and file her interplea. If she has any claim to the property attached, it must be asserted in a court of chancery.

JOHN D. DRYDEN, for appellant.

[* 633] *GLOVER & CAMPBELL, *contra*.

RYLAND, J., delivered the opinion of the court.

From the foregoing statement, it will be seen that old Mrs. Withers, to whom, during her life, the negro boy attached in this action, together with others, had been willed by her husband, with power to divide them among her five youngest children, lived with William Maddox, her son-in-law; that the negroes were with her; that a few days before the negro was attached as the property of John E. Shropshire, Mrs. Withers had allotted the boy to her daughter, Martha Shropshire, wife of John E. Shropshire; that at the time of the division of the negroes Martha Shropshire and her husband were living in Mississippi; that they knew nothing about this division.

Wm. Maddox, for whose use this suit was brought, and who, it seems, made the affidavit in order to get the attachment, was, himself, summoned as garnishee.

It also appears, that Shropshire never had possession of the negro.

This whole proceeding stands before us in an unfavorable light.

An old lady, the mother, living with her son-in-law,
[* 634] under the will of her *husband divides the negroes in her possession, at the house of this son-in-law, without

notifying her absent daughter, Martha Shropshire, who, in all probability, greatly needed this small assistance, her husband at the time, being insolvent. In a day or two after this is done, this said son-in-law, Maddox, has the negro, allotted to his wife's sister, seized by the sheriff without that sister's knowing anything of such division, and he, himself, summoned as garnishee!

During the progress of this suit, the wife of John E. Shropshire, by her next friend, Staunton Buckner, claimed the negro boy thus attached as her property, and was permitted to file her interpleader, setting up said claim. Issue was taken on this interplea, and found for the claimant, and judgment was rendered in her favor.

The plaintiff in the action moved in arrest of this judgment; his motion was overruled and excepted to. The plaintiff also moved the court below to set aside the general judgment which was rendered for the plaintiff in the suit against John E. Shropshire, and to render a special judgment against the negro boy, the property attached. This motion was also overruled and excepted to.

It appears from the record and proceedings below, that the defendant, Shropshire, appeared to the action, by attorney, and filed his plea. It was then proper to render a general judgment; the court properly overruled this last motion.

It is the opinion of this court, that the wife cannot appear and file her interplea in this action at law; that the court below had no authority to prevent such a proceeding; but the claimant should have asserted her right to the negro in the court of chancery. There was, at that time, such a court, and to that jurisdiction she should have resorted.

The court should have arrested the judgment on the interplea, and for failing to do so, its judgment, by the concurrence of the other Judges, is reversed.

THE CITY OF HANNIBAL, appellant, v. DRAPER, respondent.

15 Mo. 634.

1. *Town plats—Lots for public uses.*—Glascock filed in the office of the recorder of Marion county, a duly acknowledged plat of the town of Hannibal. Amongst other memoranda on the map was the following: "lots numbered 2, 3, 4 in block 26 is intended for church grounds," and across the lots *were written the words "church ground." Held sufficient, under the act concerning plats of towns and villages, to vest the fee in the county for public use.
2. *Dedication—Evidence of.*—When the proprietors of town property, lay it out into lots, with streets and avenues running through it, and sell their lots with reference to such plats, such conduct, on their part, will be a dedication of the streets and alleys to the public, and they cannot afterwards resume their control over them; and this principle is equally applicable to a dedication of ground for any other public use.

RICHMOND & LAMB, for appellant.

REDD & LAKENAN, *contra*.

[* 637] *SCOTT, J., delivered the opinion of the court.

This was an action in the nature of an ejectment, instituted by the appellant against the appellee, for the recovery of the possession of lots three and four, in block twenty-six on the plat of the town of Hannibal. In consequence of adverse instructions, the plaintiff submitted to a non suit, and afterwards brought the cause to this court.

It appears that in the year 1836, Stephen Glascock filed in the office of the Recorder of Marion county, a duly acknowledged plat of the town of Hannibal. The town is laid off fronting the Mississippi river, and its locality can be identified by Bear Creek, which runs through a part of the town, and mouths in the Mississippi river, very near its southern boundary. The plat is divided into blocks, streets and alleys, and the blocks, thirty-two in number, are subdivided into lots. The blocks are numbered, and so also are the lots of each block. On the margin of the plat, the length of the front and the depth of each lot are stated, and also the width of the alleys. The width of the streets, respectively, is marked on

each street. Amongst other memoranda on the map, is the following: "lots numbered 2, 3, 4 in block 26, is intended for church grounds." The reservation of the public square and landing, is made by the declaration in writing, that particular lots are intended for that purpose. The lots intended for church grounds, and the public square, were crossed entirely with red lines very near each other. Across the public square, the words "public square" are written, *and across the church [* 638] grounds are written the words "church ground." Since the year 1840, the lots in controversy have not been assessed to Glascock. The town did not improve very rapidly at first, but since 1840 it has increased considerably in population. No use, as yet, has been made of the lots by the inhabitants of the city. Glascock, by a quit claim deed, aliened the lots in dispute to the defendant, who had previously enclosed them. The act for the incorporation of the city of Hannibal prescribes, that all the real property heretofore vested in the county of Marion, for the use of the inhabitants of said town, shall be vested in the corporation hereby created; Private Acts, 1845, p. 126. The answer to the petition denies that the plat conveyed to the county of Marion the lots in controversy, and also denies that the act of incorporation of 1845 transferred the title to the lots from Marion county to Hannibal city. It is not easy to determine the precise points on which the cause turned below, as, although many instructions were refused, none were given indicative of the views of the court. As, however, the parties went to trial on the answer, we will assume that it embodied the matters relied on as a defense.

The act of 1835, concerning plats of towns and villages, provides, sec. 1, that the proprietors of every town shall make an accurate map thereof particularly setting forth and describing all the parcels of ground reserved for public purposes, by their boundaries, course and extent; whether they be intended for avenues, streets, alleys or other public uses, and all lots intended for sale, by numbers, and their precise length and width. The 4th section enacts, that such plat shall be a sufficient conveyance to vest the fee of such parcels of land, as are therein expressed, named or intended for public uses within the county in which the town is

situated, for the use of the inhabitants thereof. The 5th section of the act imposes on any proprietor who shall cause to be deposited with the Recorder, any map or plat which does not set forth and describe all parcels of ground which have been or shall be promised, or set apart for public uses, a penalty double the value of the ground promised, or pretended to have been set apart for public uses, and not set forth on the map or plat. (a)

Verily we live in a brazen age. Draper claims the lots in controversy, under a quit-claim deed. He of course is affected with notice, as he bought only such title as Glascock pretended to have. If he succeed, he will gain property by aiding in a violation of law committed by Glascock, which subjected him to a penalty equal to double its worth. It will not be contended but that the map is evidence of some pretence to set apart [* 639] these lots for church purposes, and if it fails to *accomplish that end, then Glascock has been guilty of a violation of law, and out of that violation grows the right which Draper holds. And thus a law which was intended to secure reservations for public purposes, made in laying off towns, and to prevent litigation respecting them, is made an engine for wresting them from those for whose benefit they were designed; and that, too, through the instrumentality of him, whose purpose can only be accomplished by declaring that he has trampled the law under his feet.

But, in charity to Glascock, we will not impute to him a violation of the law. We are of opinion that the plat, whatever may be thought of it by the defendant, is strictly within the act, and that it conveys to Marion county the lots, for the use of the inhabitants of the town of Hannibal. It is obvious, from an inspection of the plat, that the boundaries, course and extent of the lots intended for church purposes, are described. When any lot of the town is located, others may be. *Id certum est, quod certum reddi potest.* The length and width of all the lots of the town are written on the margin of the map. Their boundaries and course can be identified by the boundary and course of others.

(a) Gen'l Stat. of 1865, chap. 44 §§ 1, 8, 9; Wagner's Stat, pp. 1327-8.

The most usual mode of identifying any vacant lot in a town, is a reference to lots whose location is known. The lots reserved are of the same size as of all others. In addition to this, the lots reserved are cancelled with red lines, and have written across them the words "church purposes." As to the words of reservation, it will be observed that the proprietor employs one of the words, which the act contemplates as sufficient. The 4th section of the act shows that the reservation may be made by the word "intended." On the margin of the map is stated that the lots in controversy are intended for church purposes. The same word is employed by the proprietor, in making the reservations of the public square and landing.

It is presumed that in the nineteenth century, in a christian land, no argument is necessary to show that church purposes are public purposes, and that the inhabitants of a town have an interest in ground reserved for such a use. We all know what is meant by the phrase, nor will we indulge the thought, that the trust will not be carried out in the spirit in which it was originally created. To deny that church purposes are public purposes, is to argue that the maintenance, support and propagation of the christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of christianity, and extend their protection to all in that faith and mode of worship, they may choose to adopt.

*The act for the incorporation of the city of Hanni- [640 *]
bal, passed February 21st, 1845, sec. 10, vested in that
city all the title to the lots in controversy, which was transferred
by the act of reservation to Marion county, for the use of the
inhabitants of the town of Hannibal.

If the statute concerning the plats of towns were out of the way, and this question arose upon the fact of dedication alone, it is not perceived how the defendant could maintain his defense to this action. It seems now to be settled that when the proprietors of town property lay it out into lots, with streets and avenues running through it, and sell their lots with reference to such plat, such conduct on their part will be a dedication of the streets and alleys

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to the public, and they cannot afterwards resume their control over them. And this principle is equally applicable to the case of a similar dedication of ground, to be used as an open square or public walk, or a landing or commons: Trustees of Watertown v. Cowen, 4 [Paige], 513; City of Cincinnati v. White, 6 Pet. 431; City of New Orleans v. United States, 10 Pet. 662; 3 Kent, 432, 51. The case in 6 Pet. shows that the deed of the proprietor of a town, after making a dedication of a lot of ground to the public, would be inoperative to pass a title by which the inhabitants of the town could be disturbed in the enjoyment of the right conferred by the act of dedication. (a)

The other Judges concurring, the judgment will be reversed, and the cause remanded. (b)

KENNERLY *et al.*, plaintiffs in error, v. SHEPLEY, defendant in error.

15 Mo. 640.

1. *Administrator—Actions.*—The executor or administrator is a full representative of the creditors of an estate, for the purpose of prosecuting and defending actions.
2. *Administration—Allowance.*—The allowance of a claim against an estate has the force of a judgment.
3. *Execution—U. S. Marshal's sale.*—It is no objection to a sale of land made by a United States Marshal prior to the act of Congress of May 19th, 1828, that it was not made in conformity to the laws of this State regulating sales under execution.

Error to St. Louis Circuit Court—in Chancery.

BATES, for plaintiffs in error.

SPALDING & SHEPLEY, *contra*.

[* 648] *SCOTT, J., delivered the opinion of the court.

The objection, that the creditors were not made parties to the suit, cannot be maintained. In the prosecution and defense of

(a) McKee v. City of St. Louis, 17 Mo. 184; Inst. for the Blind v. How, 27 Mo. 211; Ragan v. McCoy, 29 Mo. 356; Becker v. City of St. Charles, 37 Mo. 13; Rutherford v. Taylor, 38 Mo. 315.

(b) See same case, 36 Mo. 332.

claims, the executor or administrator is deemed a full representative of the creditors of the estates respectively committed to their care. The object of the suit being to restrain the administrator from selling property to pay debts of a deceased person, and to set up a lost deed, it was sufficient to bring before the court the administratrix and the heirs, who fully represented the property, and are liable for all demands upon it: Story's Equity Pleadings, sec. 150; Mitford, 166.(a)

The allowance of a claim against a deceased person's estate, is a judgment and will be respected as such. But there is some difficulty in maintaining that those allowances are liens upon the estate. Formerly, when an execution could issue on a judgment in the circuit court against an administrator, it was held that such judgment was no lien upon the estate of the decedent in his hands. If there was no lien, when the lands could be sold under execution, it would be hard to maintain that a lien is created by the allowance of a demand in the county court. No argument will be made here on the subject, but a reference to the case of *Prewitt v. Jewell*, 9 Mo. Rep. 732, will show what has been said on that subject. The administrator has no interest *in the real estate to which a lien could attach itself by reason of a judgment against him. In the theory of our law, lands, upon the death of the ancestor, descended to his heirs, and there is a contingent power in the administrator to sell the lands to pay the debts, with a right to lease and preserve them until distribution is made. The administrator and heirs succeed only to the interest of the deceased. They can obtain no greater right than he had. The administrator and heirs, coming in as volunteers, the unrecorded deed was binding on them. The land was gone at the death of Kennerly. The power of affecting it in any way to the prejudice of the unrecorded deed, was extinguished. It should not have been inventoried, or regarded as a part of the estate of the deceased. The creditors having no interest in the lot at the death of the intestate, and on his death the unrecorded deed being binding on the representatives, it was impossible that

(a) *Miles v. Davis*, 19 Mo. 414.

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any right to the lot could accrue to them, which would subject it to the claim of creditors. If the lands should be sold by the administrator, he could only convey the right Kennerly had at the time of his death, and as to Kennerly there was no right.

Considering the length of time from the execution and delivery of the marshal's deed, the evidence of its contents is sufficient. The formal parts of the deed were printed, and we are informed by the testimony that the marshal's deed was used in drawing a subsequent deed for the same lot, and, moreover, that the court took the acknowledgment of the same.

It is objected that the sale of the lot, made by the marshal, was not in pursuance to the laws of Missouri, in force at that time. The act of Congress, of the 16th of March, 1822, established a District Court for the District of Missouri. That act conferred on said court the jurisdiction and powers which by law were given to the judge of the Kentucky District, under the act of September 24th, 1789, and the act of 2d March, 1793, and the acts supplementary thereto. The seventh section of the act of 2d March, 1793, gives power to the courts of the United States to make rules and orders for their respective courts, directing the returns of writs of process, and to regulate the practice of the courts respectively. It is conceded that neither the act regulating process in the courts of the United States, of the 29th of September, 1789, nor the act of 8th May, 1792, empowering the courts to make such alterations and additions to the forms of writs, executions and other processes [as] they deem expedient, were [not] in force in this State; those acts being confined in their operation to the States of the Union in existence at the time of their passage.

[* 650] The sale in this case *having been made prior to the act of Congress of the 19th May, 1828, adopting the practice of the State courts for those States admitted into the Union subsequently to the 29th September, 1789, we must look to the act of 1793 for the powers to be exercised by the District Court of Missouri, in relation to the execution of process emanating from that court.

It is no objection to the sale that it was not made in conformity

to the law of this State regulating sales under process of execution. The State laws, as such, are not binding on the officers of the federal government. They can only become so by being adopted by the laws of the United States, or by the rules of their courts. When the sale was made there was no written rule of the court. It had not exercised the power conferred by the 7th section of the act of 1793, of making rules regulating its practice and the returns of process. Under these circumstances the marshal made his sale, conforming, as nearly as practicable, to the laws of this State. In the case of *Wayman v. Southard*, 10 Wheat. 22, it was held that the 14th section of the judiciary act of 1789 authorizes courts to issue writs of execution. In the same volume, in the case of *United States v. Holsted*, 51, it was maintained that the courts can so alter their process as to sell lands on execution when not subject to sale by the State laws. These cases arose in Kentucky, not one of the States in existence in September, 1789. The case of *Fullerton v. Bank of the United States*, 1 Peters, 604, originated in the State of Ohio, at a time when the powers of the federal courts in that State were similar to those entrusted to the District Court of Missouri at the time of this sale. This case maintains that a practice or mode of procedure could be adopted by usage, without written rules. The taking the acknowledgment of the deed was evidence of the sanction of the usage by the court. Such a circumstance must have brought the matter to the attention of the court, and had the manner of conducting the sale been disapproved the acknowledgment would not have been taken, and a written rule would have been made for the conduct of future sales. We do not see the force of the objection that the usage had not been long practiced. It was conformed to in many cases, sufficient to make it known, and when the usage was established its effect must be to sustain and support instances under it, occurring as well before as after it had been much practiced. It would sustain the very first instance under it. (a)

The deed executed by O'Fallon and wife to Mrs. Kennerly

(a) Keene v. Barnes, 29 Mo. 377.

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having never been delivered, and being cancelled in the
[* 651] presence of her *husband, with his assent and that of
the grantor, could convey no title to her.

Judge Ryland concurring, the decree below will be affirmed.

Judge Gamble did not sit in this cause.

HOFFMANN, appellant, v. CITY OF ST. LOUIS, respondent.

15 Mo. 651.

Municipal corporation—Powers.—The power conferred on the City of St. Louis, in regard to the grading of streets, lanes and avenues, is a continuing power, and is not exhausted upon the first use. When, therefore, the grade of a street has been fixed, and improvements made in conformity to it, it may be altered by the corporation, and no action lies for the injury the alteration may occasion: (*Gurno v. The City of St. Louis*, 12 Mo. 414; *Taylor v. The City of St. Louis*, 14 Mo. 20.)

Appeal from St. Louis Circuit Court.

R. M. FIELD & JAS. McMARTIN, for appellant.

J. C. RICHARDSON, City Counselor, *contra*.

[* 653] *RYLAND, J., delivered the opinion of the court.

The city of St. Louis passed an ordinance on the 14th September, 1843, by which it fixed the grade of Clark avenue, a public street of said city.

The appellant became the proprietor of a lot on Clark avenue, 120 feet in front, and erected two dwelling houses along the front of his lot, conforming to the grade as established by the forementioned ordinance, and having their lower stories level with the ground.

On the 10th of August, 1851, the city passed an ordinance changing the grade of Clark avenue, and agreeably to its provisions, proceeded to fill up the street in front of appellant's dwelling houses, so as to render them of materially less value. The last mentioned ordinance was passed on petition of many of the lot owners on the avenue, and without any actual intention to

injure the appellant. An agreed case, containing the forementioned facts, was submitted by the parties to the St. Louis court of common pleas. That court gave judgment for the city, and Hoffman brings the case to this court by appeal.

The principles involved in this case have heretofore, for the most part, been settled by this court, in the case of *Gurno v. the City of St. Louis*, 12 Mo. Rep. 414, and *Taylor, et al. v. the City of St. Louis*, 14 Mo. Rep. 20. So far, therefore, as these cases are applicable to the present case, they will control it.

The appellant, however, contends that there is a manifest distinction between these cases and the one now before the court. In the present the injury arises not from the exercise by the city of the power to grade the streets, &c., but from the exercise of a power to change and alter the grade of a street, after having once fixed it. It is the alteration of this grade that now causes the injury, not the mode and manner of making it originally. This alteration materially lessens the value of the dwelling houses first erected in conformity with the then established grade of the avenue.

The question resolves itself into this. Does the power to grade streets, &c., become exhausted when once exercised, or is it a continuing power, in the hands of the corporation, to be exercised as the judgment of that body may determine, for the good of the whole?

The charter of the city contains the following clause: (Art. 3, sec. 2, eighth clause of the section). "To open, alter abolish, widen, extend, establish, grade, pave or otherwise improve, clean and keep in repair, streets, avenues, lanes and alleys; but the Mayor and city council shall not establish nor open a street, lane, avenue or alley, through the ground *lying [* 654] and being situate between Ninth street and Eleventh street, and Washington avenue and Green street, without the written assent of the proprietors of the St. Louis University, so long as the building now used as a University remains erected thereon."

It is the opinion of the court, that the power hereby conferred upon the city, in regard to the grading of streets, lanes and

avenues, is a continuing power, and is not exhausted upon the first use, but must remain to be exercised not with wanton caprice, but as the judgment of the corporate powers may deem most conducive to the welfare and prosperity of the city.

It is lawful for the city, by its Mayor and council, "by ordinance, to alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean and keep in repair streets, avenues, lanes and alleys." This is not only a general and ample power, but from its nature, must be a continuing power. They may "alter a street;" how? By raising up or by cutting down or by lateral variation. What is to hinder the alteration of the grade?

In the matter of opening Furman street, in the City of Brooklyn, 17 Wend. 649, it was decided, that the power of a corporation, of a village or city "to regulate, level and pave streets," is a continuing power, and the level of a street, although once adopted, may be changed, even after it has been paved, or otherwise prepared for public use.

The language of the court in this last case is, "That the authority to regulate, level and pave streets is, in its nature a continuing power, or one that does not cease the moment it is once executed. It was given for the purpose of promoting the public safety and convenience, and although the power should never be exercised capriciously, or upon light considerations, yet there is no doubt that the corporation may change the level of any street, even after it has been paved or otherwise prepared for public use.

In the case of Callender v. Marsh, 1 Pick. 431, Chief Justice Parker said, that "those who purchase house lots bordering on streets, are supposed to calculate the chance of such elevations, as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient; and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they may see fit."

In the case of Goszler v. the Corporation of Georgetown, 6 Wheat. 593, the supreme court of the United States held that the

power given to the corporation of Georgetown, by the act of Maryland Legislature *of November, 1797, to [* 655] graduate the streets of that city, is a continuing power, and the corporation may, from time to time, alter the gradation so made.

In the year 1797, the legislature of Maryland, among certain additional powers given to the corporation of Georgetown, enacted, that they shall have full power and authority to make such by-laws and ordinances for the graduation and leveling the streets, lanes and alleys, within the jurisdiction of the same town, as they may judge necessary for the benefit thereof. In pursuance of this authority, the corporation passed an ordinance in May, 1799, for the graduation of certain streets; the first section of which appoints commissioners, and authorizes them to make the level and graduation of the streets. The second is in these words: "And be it ordained, that the said level and graduation, when made by the commissioners, or a majority of them, and returned to the clerk of this corporation, shall be forever thereafter considered as the true graduation of the streets so graduated, and be binding upon this corporation and all other persons whatever, and be forever thereafter regarded in making improvements on said streets."

The plaintiff owned lots upon one of these streets, and made improvements thereon, according to the graduation made and returned to the clerk of the corporation under directions of this ordinance. In September, 1816, the corporation passed another ordinance, directing the level and graduation of this street to be altered; and the commissioners appointed, being about to cut down the street by the plaintiff's house, were enjoined from proceeding by a bill filed against them and the corporation by the complainant. Upon the final hearing, the circuit court dismissed the bill, being of the opinion that the corporation had the power, asserted by them in their answer, of altering the level and graduation of a street graduated under the former ordinance of May, 1799. The supreme court decided that this power was a continuing one in the corporation; that the original power continues after its first exercise. Chief Justice Marshall did give some

weight to the phraseology of the act. He said, that the power was not to graduate and level the streets, or to make a by-law for the graduation and leveling of the streets, but to make such by-laws, and ordinances for the graduation and leveling of the streets, &c., as they may judge necessary for the benefit of the town. "The act" says the Judge, "contemplates a continuance of the power, [and] a repetition of the by-laws and ordinances as the corporation may judge necessary for the benefit of the town. It gives a power to legislate on the subject, and to pass more than one by-law, and ordinance respecting it." This, like [* 656] all power, is *susceptible of abuse, but is trusted to the inhabitants themselves who elect the corporate body, and who may, therefore be expected to consult the interests of the town." "The graduation and leveling of the streets is not necessarily a single operation."

The power given to the corporation of St. Louis, by its charter, is equally as ample as that given to Georgetown. The 3rd section of the 3rd article of the charter declares: "That the city council shall have power, subject to the restriction of the last clause of the second section (which restriction consists of the words "not repugnant to the constitution and laws of this State"), to make all ordinances, which shall be necessary and proper for carrying into effect the powers specified in the preceding section, and all other powers vested by this act in the corporation, the city government, or any department or officer thereof." The city authorities, in our opinion, having the power to alter the grade of the streets and avenues, this case must then fall within the class of cases like those of *Gurno v. the City of St. Louis*, and *Taylor and others v. The city of St. Louis*, heretofore decided by this court.

In the case of *Hay v. Cohoe's Company*, 2 Comstock, 159, the court observed, that "no one questions that the improvements contemplated by the defendants, upon their own premises, was one proper and lawful. The means by which it was prosecuted were illegal, notwithstanding; they disturbed the rightful possession of the plaintiff, and caused a direct and immediate injury to his possession." Let the city authorities go beyond the corporate limits of the city, purchase a tract of land (if it had the

power), and commence blasting rock thereon, so near to the dwelling house of a proprietor of an adjoining tract of land, as to break his windows or roof, and the cases will be more parallel.

The liability of the corporations to actions for consequential damages, has engrossed the attention of the Courts of most of the States of the Union, and the decisions are not uniform, but are more or less contradictory and conflicting. We acquiesce in the decisions of this Court in the cases of *Gurno v. The City of St. Louis*, and *Taylor et al. v. The City of St. Louis*, heretofore made; and being satisfied of the power of the corporation to grade anew the avenue in question, this case must be determined according to the ruling in those cases. (a)

The other Judges concurring, the judgment below is affirmed.

KINGSLAND & KINGSLAND, respondents, v. WORSHAM & ROBINSON, appellants.

15 Mo. 657.

Attachment—Absent or absconding debtor.—It is not every casual and temporary absence of a debtor from his usual place of abode, that furnishes a legal ground for issuing an attachment against his property; it must be such, as to prevent the ordinary service of process upon him.

Appeal from St. Louis Court of Common Pleas.

T. POLK, for appellants.

*R. M. FIELD, *contra*.

[* 659]

GAMBLE, J., delivered the opinion of the court.

The act providing for the recovery of debts by attachment allows such writ to issue "where the debtor has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." (b) The attachment in the present case, was issued upon an affidavit

(a) *Soulard v. City of St. Louis*, 36 Mo. 546.

(b) Gen'l Stat. of 1865, chap. 141, § 1; Wagner's Stat. p. 180.

alleging, in the words of the law, that the defendants had absented themselves from their usual place of abode, &c. The truth of the affidavit was denied by plea, and upon the trial of the issue, several instructions asked by the defendants were refused, and one was given by the court on its own motion. Our attention will be given to this last instruction, as the views entertained by the court in relation to the clause of the act under which this attachment issued, can be fully expressed in considering the correctness of this instruction.

The instruction asserts, as a matter of law, that the attachment under this clause of the statute may be rightfully sued out in any case in which a defendant has absented himself from his usual place of abode in the State, and was absent at the time of the issuing of the attachment, if he had no family residing here, and left no white person of his family above the age of fifteen years at his usual place of abode, and no agent authorized to receive service of a summons.

This is stated to the jury as the law in a case in which the attachment was issued on the 23rd day of July, and the property of the defendant seized upon that day, and the defendants personally summoned on the writ on the first day of August, [* 660] to appear at the third Monday of *September to answer the action. It is obvious that if the meaning of the statute is properly expressed in this instruction, then every man in this State, whose domestic servants are negroes, and who goes with his family upon a visit for a few weeks or even days to his friends in another State, or to another county in this State, is subject to have his property seized by any creditor upon an attachment, although it may be certain that he will return to his home in time to admit of the regular service of a summons upon him, returnable to the next term of the court in his county. Or a person engaged in business, who is a boarder at a hotel, and is absent for a few days upon business or recreation, may, on his return, find all his effects in the hands of the sheriff by a regular legal attachment. Such a construction of the statute is not to be admitted, unless there is something in its language that absolutely requires us to give it this meaning.

There are two general objects proposed in the act ; the first is, to subject the property of non-resident debtors to the demands of our own citizens ; the second, to enable a creditor to seize the property of a debtor who has acted or is about to act fraudulently. There are some cases specified in the act in which attachments may issue. The first is, "where the defendant is not a resident of nor residing within the State." All others are designed to reach the property of resident debtors. The second allows an attachment "where the debtor conceals himself so that the ordinary process of law cannot be served upon him." This applies to the case of present misconduct of the debtor, by which the creditor is prevented from having his action against him in the ordinary mode. The third allows an attachment "where the debtor has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." If this clause includes two cases in which an attachment may issue, one because the debtor has absconded, and the other because he has absented himself from his usual place of abode, the first places the right to the attachment upon the misconduct of the debtor, in "withdrawing or absenting himself privately," which is the definition of absconding ; and the second, upon his absenting himself from his usual place of abode, so as to produce the hindrance to the creditor in bringing his action in the ordinary mode. If the clause embraces two distinct grounds of attachment, then the language must not be so construed as to make one of them include the other. If the case of the defendant's absenting himself from his usual place of abode is made to include all cases of such absence, then it is difficult to imagine a case in which the plaintiff would be required to swear that the debtor had absconded. The last *words of the sentence, "so that the ordinary process of [* 661] law cannot be served upon him," seem to be applicable to both cases, and, upon the supposed instruction, any absence would be just as good a ground for attachment as the secret withdrawing which constitutes the absconding mentioned in the statutes. Regarding the clause as containing two distinct grounds of attachment, the first, or absconding, must subject the debtor to the pro-

cess because of the character of his act, in secretly withdrawing himself from his residence ; and the second, or absenting himself, must have the same effect, because of its continuance. The facts of the case, cited from 1 Wendell, 43, furnish an illustration of the interpretation here given to the act. There the defendant, a resident of New York, went to Scotland in 1824, partly on business and partly for pleasure. He continued absent although declaring his intention to return, and in 1826 the attachment was issued. Such absence, as he left no family, completely prevented the institution of a suit against him by ordinary process, and was held, under all the circumstances of the case detailed in the report, a good ground for an attachment under a statute that required a residence abroad to authorize such process to be issued. In mentioning this case, it is not intended to limit the operation of this clause of the statute to cases of like circumstances. It is merely alluded to as a case in which the absence of the debtor from his place of abode had the effect of preventing the service of ordinary process.

While it is not admitted that every casual and temporary absence of the debtor from his place of abode, which, from the brief period of his absence, may prevent the service of a summons, is a legal ground for issuing an attachment against his property, it is difficult to define the character and prescribe the duration of the absence which shall justify the use of this process. It may be asserted, however, that where the absence is such that if a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him. This is probably sufficient for the present case. It shows the point in which, in our judgment, the court erred in the instruction given to the jury.

It is proper here to remark, that in construing this statute, it is not allowable to extend its operation to cases which are not within the evil it was designed to remedy. It is a statute under which much oppression may be practiced, and the legislature have

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felt the necessity of throwing guards around those against whom it may be employed. If *this court should sanc- [* 662] tion its use in a case not within the true scope and spirit of the act, upon the supposition that it may be brought within its letter, to that extent the precautions taken by the legislature, to prevent the abuse of the process, would be useless to the injured party.

With the concurrence of the other Judges, the judgment is reversed, and the cause remanded.(a)

DOBYNS, defendant in error, v. MCGOVERN *et al.*, plaintiff in error.

15 Mo. 662.

1. *Administration—Bond.*—Executors who have given bond for the faithful performance of their trust, are jointly liable, as principals, to indemnify the surety, who has been subjected for the default of one of them, and that too, though the default occurred after the death of one of the executors and while the estate was under the sole management of the surviving executor.
2. *Equity—Chose in action.*—A chose in action is assignable in equity, and the assignee may sue in his own name.
3. *Equity—Court of—Jurisdiction.*—When a court of equity has cognizance of a subject, its authority over it is not lost by reason of a concurrent jurisdiction being conferred upon another tribunal.

Error to St. Louis Court of Common Pleas.

GEYER & DAYTON, for plaintiff in error.

FIELD, *contra*.

SCOTT, J., delivered the opinion of the court. [666]

The case of Owen's Executor v. Aaron Overton, Executor, &c., (b) decided at the January term of this court for the present.

(a) Ellington v. Moore, 17 Mo. 424; Ross v. Clark, 32 Mo. 296; Adams v. Abernathy, 37 Mo. 196.

(b) The case referred to is that of Overton v. Woodson, 17 Mo. 453.

year, recognized the principle of *Babcock v. Hubbard*, 2 Conn. 536, that executors who have given bond with surety for the faithful performance of their trust, are jointly liable, as principals, to indemnify the surety who has been subjected for the default of one of them. Though the liability of each of the executors, as parties to the bond, may, as between themselves, resemble that of a surety for his principals, yet, as regards the surety, who to every intent is merely such, they must clearly be considered as joint principals, and bound to indemnify him for money that he has paid for any of them. This doctrine is not denied by the plaintiffs in error, but it is contended that our statutes on the subject of administrators and executors has altered this principle, or at least rendered it inapplicable to the present case. The bonds in which the defendant in error was bound as surety for Hugh O'Neil and Philip McGovern, were dated on the 2d day of June, 1836. The liabilities of the surety and his right to indemnity must be determined by the law in force at the date of his undertaking. By the 32d section of the 1st article of the administration law of 1835 it is provided, that if there be more than one [* 667] executor *or administrator and a part die, those who remain shall discharge all the duties required by law respecting the estate. By the 34th section of the same article it is enacted, that if any administrator die, his legal representatives shall account for, pay and deliver to the remaining administrator all money, property, &c., belonging to the estate. The 35th section of the same article makes it the duty of the remaining executor to proceed against the delinquent and his sureties. (a)

It is contended, for the plaintiff in error, that no devastavit having been committed by McGovern before his death, and his representatives being compelled to deliver up the estate to the sole management of O'Neil, it is unjust to make McGovern's heirs responsible for the acts of O'Neil after McGovern had ceased to have anything to do with the estate of the Reillys. If this were a controversy between O'Neil and McGovern, this argument would certainly have great force. But the contest is between McGovern and his surety.

(a) Gen'l Stat. of 1865, chap. 120, §§ 45, 47, 48; Wagner's Stat. p. 77.

McGovern is presumed to have known the nature of the obligation he incurred by joining as principal in the bond with O'Neil. He knew that the state of things that now exists might have occurred, and that on the event of his death the sole administration would devolve on O'Neil. It is no argument that the law did not allow administrators to give separate bonds; McGovern was not compelled to become joint administrator. Because he could not enter into a separate bond, that cannot change the nature of the joint obligation to which he voluntarily became a party. The fact that McGovern was a joint administrator may have induced Dobyns to become surety. We all know that a man would sign a joint administration bond as surety, when there is a particular name to it, which he never would have signed had that name been omitted. He might have relied on the integrity of a name and the ability of its bearer to indemnify him, while he had no confidence whatever in the joint administrator. On the death of one of two administrators the sole administration devolves on the surviving administrator, and, of course, the law contemplated that the obligation of the bond covered that state of things.

It does not appear that under the 26th section of the first article of the administration law, (a) the surety could have released himself, as a knowledge of none of the facts set forth in the section is traced to him, nor are they shown to have existed prior to the devastavit. Nor is it shown that the defalcation of O'Neil occurred subsequently to the passage of the act of 11th of January, 1841, which took effect only a short time prior to his death. We will not determine whether the mere omission of the surety to apply for a discharge, not being required to *do [* 668] so, and no knowledge of any fact which should prompt him to such a step appearing, would bar his recourse for indemnity against his principal.

We see no objection to the recovery of the money paid on account of Shade. He was liable for one-third of the judgment against McGovern's sureties, and paid a thousand dollars to his co-sureties, who, in consideration thereof, released him from his

(a) Gen'l Stat. of 1865, chap. 120 § 37; Wagner's Stat. p. 76.

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liability and took an assignment of his claim for indemnity against McGovern's estate. A chose in action is assignable in equity, and the assignee may sue in his own name: 2 Story's Equity, sec. 1047, 1057. It is a principle of chancery jurisprudence, that when a court of equity has cognizance of a subject, its authority over it is not lost by reason of a concurrent jurisdiction being assumed by or conferred upon another tribunal. So the ancient jurisdiction of the courts of chancery in relation to this matter is not taken away, because courts of law now permit an assignee to use the name of the assignor to recover a debt which may be assigned. (a)

Judge Ryland concurring, the judgment will be affirmed. Judge Gamble not sitting.

BENOIST *et al.*, respondents, v. THE CITY OF ST. LOUIS, appellant.

15 Mo. 668.

Revenue—St. Louis—Lands not laid off.—Under the act of February 8th, 1843, reducing into one, the several acts relative to the incorporation of the City of St. Louis, lands not laid off into blocks and lots, may be taxed according to their actual value; and there is nothing in the act requiring the corporation to tax them according to the supposed profits that might be made from them, were they used for agricultural purposes.

Appeal from St. Louis Circuit Court.

J. C. RICHARDSON, City Counselor.

SPALDING & SHEPLEY, *contra*.

[* 670] *SCOTT, J., delivered the opinion of the court.

The plaintiffs were owners of a tract of land, a portion of which, 211 acres and a fraction, was thrown within the new limits of the

(a) See Gen'l Stat. of 1865, chap. 161, § 2; Wagner's Stat. p. 999; La-beaume v. Sweeney, 17 Mo. 153; Walker v. Mauro, 18 Mo. 564; McPike v. McPherson, 41 Mo. 521.

city of St. Louis by the act of 1841, entitled "An act to amend an act to incorporate the city of St. Louis." By the 17th section of the 7th article of this act it is provided, that the lands thrown within the limits by its authority should not be taxed more than one-sixteenth of one per cent., until certain improvements, beneficial to the residents and landholders within the new limits, should be made, which were required to be completed within twelve months from the passing of the act. On the 8th of February, 1843, an act was passed to reduce into one the several acts relative to the incorporation of the city of St. Louis, the 10th section of which (art. 6) provides, that lands within the limits of the city, which have not been laid off into blocks and lots, shall not be assessed or taxed otherwise than by the acre as agricultural lands, and shall continue to be so assessed and taxed till laid off into blocks and lots by the owners thereof respectively. The actual value of the land was estimated at \$6,000 per acre, but, if used for agricultural purposes only, its estimated worth was two hundred dollars per acre. The assessment was made on its actual value, \$6,000 per acre, at the rate of one-sixteenth of one *per cent., according to the provisions of the act of [* 671] 1841. The plaintiff appealed from the assessment to the city authorities, in pursuance to the ordinance in relation to appeals, when the assessment was confirmed, and they then applied to the circuit court for an injunction, when the proceedings were perpetually enjoined; from which decree the city of St. Louis appealed.

The question, in this case, arises on the above recited provision of the act of 1843. Shall the lands be taxed according to their actual value, or according to the supposed profits that might be made from them, were they used for agricultural purposes. The act of 1841 brought within the limits of the city some farms and portions of farms, and the act of 1843, from its terms, was designed to point out the mode in which they should be assessed. They are required to be assessed by the acre, as agricultural lands, until they are laid off into blocks and streets. If the ellipsis is supplied, the sentence will read as agricultural lands are assessed or taxed. This is the grammatical construction of

the language of the act, and it comports with the obvious intent of the legislature. There is nothing else in the act which shows that any other than the real value of the land, by the acre, should be regarded in assessing it. The object of the law, in increasing the limits of the city, was to make those contribute something to its improvement, whose lands had been so much enhanced in value by reason of her expenditures. If the mode of assessment contended for by the plaintiff is sanctioned, the purpose of the act will be defeated, as the product of such an assessment would scarcely compensate the officers in making and collecting it. For, let it be borne in mind, that at this time the assessment could not exceed one-sixteenth of one per cent. Had the improvements contemplated by the act of 1841 been made within the new limits, would it be contended that afterwards, the land owners within them, for ground which they did not choose to lay out in blocks and lots, could only be taxed according to the profits which might be made from it when used for agricultural purposes. The amendment to the charter of 1847 requires that one-fourth of the taxes on lands and licenses collected within the new limits, shall be expended within them in improvements, and the act of 1849 gives one-half of these taxes for these purposes, and continues the act of 1847 in force for two years. Shall these improvements, made in part at the expense of others, continue to enhance the value of the estates of the land-owners yearly, and yet shall not their taxes be increased in proportion to the enhanced value of their property? By the mode of assessment contended for, while the yearly value of the land is increased, its value for [* 672] agricultural purposes may be *diminished. The compensation to land holders for including their farms within the limits, is to be found in the great improvements required by the act of 1841, and not in the supposed mode of assessment, as is clearly shown by the guaranty given, that their taxes shall not exceed one-sixteenth of one per cent. until the improvements are made, while property within the old limits might be taxed as high as one-half of one per cent.

The other Judges concurring, the decree will be reversed, the injunction dissolved, and the complainant's bill dismissed.

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ERRATA.

At foot of page 48, add words "*with the.*"

On page 71, in foot note, for "Miles v. Davis *id.* 408," read "*Miles v. Davis, 19 Mo. 408.*"

Page 117, line 16, for "proper" read "*improper.*"

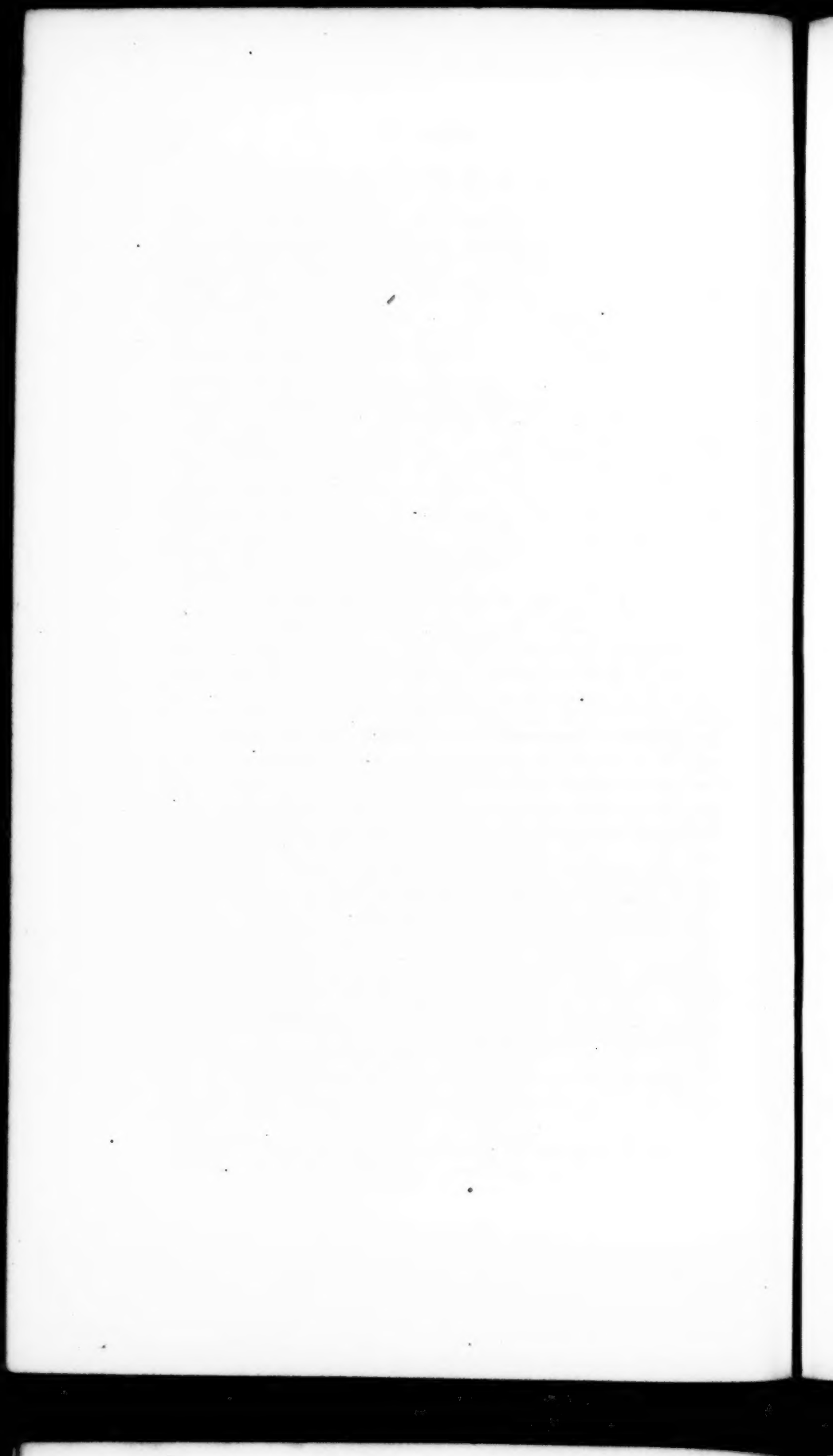
Page 125, line 2 of foot note, for "37 Mo. 243," read "37 *Mo.* 343."

Page 199, in last line of syllabus, omit the word "*made.*"

Page 244, to last line of syllabus, add word "*precedent.*"

Page 290, in 3d line of note, (a) for "5 Mo." read "25 *Mo.*"

Page 334, in 1st line of syllabus, for "action" read "*indictment.*"



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11. **CONTRACT—DUTY CREATED BY LAW AND BY ACT OF PARTY.**—When the law creates a duty, and the party is prevented from performing it, without any default in him, and he has no remedy over, the law will excuse him. But when the party, by his own contract, creates a charge or duty upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it, by his contract.

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Overton v. McFarland, 191.

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CRIMINAL LAW.

1. COUNTERFEITING—ABETTOR.—It is not necessary that one should be present actively aiding and assisting in the passing of counterfeit money to constitute him an aider or abettor. State v. Mix, 100.
2. EVIDENCE—GUILTY KNOWLEDGE.—It is competent, in order to show guilty knowledge in one who had passed a counterfeit bank-note, to prove that he had passed other counterfeit bank-notes of a similar kind at other times. State v. Mix, 100.
3. EVIDENCE—POSSESSION OF STOLEN PROPERTY.—Possession of stolen property, to raise a presumption of guilt, must be recent after the theft. State v. Wolff, 110.

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1. CONTRACT—MEASURE OF DAMAGES.—The contract price is the measure of the plaintiff's damages, unless the defendant, by evidence, shows that the damage actually sustained is less than the price agreed upon. Pond v. Wyman, 116.

2. DAMAGES.—Rule when defendant prevents plaintiff from performing his contract. *Ibid.*
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4. STATUTORY COVENANTS.—For the breach of the statutory covenants the recovery can only be for nominal damages, unless there has been an eviction. *Mosely v. Hunter*, 199.
5. BREACH OF COVENANT—EVIDENCE.—In an action for a breach of covenant against incumbrances, it is competent for the plaintiff to show that an incumbrance, which existed when the covenant was made, has ripened into an adverse and superior title, and that there has been an eviction under it since the institution of the suit. *Ibid.*
6. MUNICIPAL CORPORATION.—A municipal corporation is not liable for damages consequent upon digging a ditch by its authorized agents in pursuance of an ordinance of the corporation, when the work is not carelessly or negligently done. *Lambar v. City of St. Louis*, 389.

DOWER.

1. COMPUTATION.—The yearly value of the widow's dower in real estate, when it is not susceptible of division, and when she is to take an annual sum in lieu of dower, under the twenty-eighth and twenty-ninth sections of the act concerning dower (Revised Code, 435), is its net annual product, without the expenditure of money or labor upon it, after deductions have been made from its gross income of all the charges to which it is subject, such as taxes and repairs. *Riley v. Clamorgan*, 203.
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3. DOWER.—The law in force at the time of the husband's decease determines the widow's right to dower. *Ibid.*
4. BARRED BY EXECUTION.—A special execution, issued on a judgment rendered in a suit against the husband alone, to foreclose an equity of redemption under a mortgage executed by the husband and wife, and accompanied by the wife's acknowledgment and relinquishment of dower, bars the wife's dower claimed under act of 1825. *Ibid.*
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EQUITY.

1. COURT OF EQUITY—POWERS.—If a party, in the prosecution of a lawful demand, in a lawful way, acquires a legal right, it cannot be disturbed by a court of equity. To justify such interference, there must be some trust, confidence, agreement, or relationship imposing an obligation to avoid the advantage obtained. *McCourtney v. Sloan*, 72.
2. MISTAKE.—When, by mistake, a contract is not expressed in such terms as to have the force and effect the parties intended, it is the duty of the court to correct the mistake in the instrument; nor is it material whether the instrument is an executory or an executed agreement; nor whether the proceeding is directly, by bill, to correct the mistake, or the mistake is set up in the answer, by way of defense. *Leitensdorfer v. Delphy*, 106.
3. PRACTICE IN EQUITY.—Such parts of a bill of discovery as are not answered, or not sufficiently answered, cannot be taken as confessed. The party seeking the discovery, if he considers the answer sufficient, must except to it, and have the decision of the court upon his exception. *Roussin v. St. Louis Perp. Ins. Co.*, 158.
4. PRACTICE IN EQUITY.—An answer in chancery, although directly responsive to a fact stated in the bill, and denying its truth, may be overthrown by the evidence of one witness and corroborative evidence. *Johnson v. McGruder*, 222.
5. COURT OF—JURISDICTION.—When a court of equity has cognizance of a subject, its authority over it is not lost by reason of a concurrent jurisdiction being conferred upon another tribunal. *Dobyns v. McGovern*, 423.
6. OBJECTION TO JURISDICTION WAIVED BY ANSWER.—If a defendant answer, instead of demurring to a bill, and the cause comes on to be heard upon the merits, it is too late to object to the jurisdiction of the court on the ground that the plaintiff has adequate remedy at law, which he might have pursued. *Oldham v. Trimble*, 145.
7. CHOSE IN ACTION.—A chose in action is assignable in equity, and the assignee may sue in his own name. *Dobyns v. McGovern*, 423.
8. INFANT.—A decree in a chancery cause against an infant, for want of answer, and without proof of the statements of the bill, is altogether erroneous. *Heath's adm'r v. Ashley's adm'r*, 249.

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See GUARDIAN AND WARD, HUSBAND AND WIFE.

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1. REPLEVIN—DEFENSE.—A. mortgaged certain chattels, of which he retained the possession. At a sheriff's sale, under an execution against A., these chattels were purchased by B., who brought replevin against A. *Held*, that A. is not estopped from setting up the defense that he had no interest in the goods subject to sale under execution.

Yeldell v. Stemmons, 286.

2. COMPROMISE.—One who, with a knowledge of all the facts, compromises a suit, and gives his note in accordance with the terms of the compromise, cannot, when sued on such note, set up a defense which he might have interposed to the original suit.

Draper v. Owsley, 391.

EVIDENCE.

1. EVIDENCE.—Defendant was indicted for the murder of one Hibler, a police officer, who was attempting to arrest him without a warrant. *Held*, that evidence was admissible to show that deceased was a police officer, and that defendant was in the act of violating a city ordinance, though neither of these matters was averred in the indictment.

State v. Roberts, 16.

2. DYING DECLARATIONS.—In a trial on an indictment for murder, the dying declarations of the deceased are admissible in evidence, if made in the prospect of immediate death, and when he entertained no hope of recovery.

Ibid.

3. RECORDER'S CERTIFICATE.—A certificate of confirmation issued by the recorder under the act of 26th May, 1824, is only *prima facie* evidence of a confirmation under the act of the 13th June, 1812.

McGill v. Somers, 61.

4. RECORDER HUNT'S DESCRIPTIVE LIST.—The descriptive list sent to the surveyor's office, by authority of the act, is evidence of as high a character as the certificate would be, and a properly authenticated extract from it is entitled to all the effect that the original certificate would have.

Ibid.

5. BANKRUPTCY—DISCHARGE.—A certificate of discharge under the bankrupt law of the United States is conclusive evidence in favor of the bankrupt, and may be pleaded as a full and complete bar against all suits for debts embraced within it, unless impeached for fraud.

Reed v. Vaughan, 91.

6. PRESUMPTION.—An account delivered to the party charged therewith, is presumed to be correct if kept for a long time without objection made thereto.

Shepard v. Bank of Mo., 95.

7. PRESUMPTIONS.—It will be presumed that a note held by a corporation was acquired in a manner allowed by its charter, when the record does not show the nature of the transaction.

Roussin v. St. Louis Perp. Ins. Co., 158.

8. GUILTY KNOWLEDGE.—It is competent, in order to show guilty

- knowledge in one who had passed a counterfeit bank-note, to prove that he had passed other counterfeit bank-notes of a similar kind at other times. State v. Mix, 100.
9. POSSESSION OF STOLEN PROPERTY.—Possession of stolen property, to raise a presumption of guilt, must be recent after the theft. State v. Wolff, 110; State v. Floyd, 213.
10. It is the duty of the court to tell the jury what facts are admitted by the pleadings. Butcher v. Death & Teasdale, 169; Steil v. Ackli, 182.
11. BURDEN OF PROOF.—In an action against an administrator *de bonis non*, the burden of proof is upon the plaintiff, to show the amount of assets that went into his hands, and a failure to account for them. State, to use of Taylor, v. Collier, 183.
12. CONTRACT—RESCISSION.—The rescission of a contract may be proved by the acts and declarations of the parties, though no distinct proposition to rescind made by either party can be shown. Fine v. Rogers, 195.
13. BREACH OF COVENANT—DAMAGES.—In an action for a breach of covenant, against incumbrances, it is competent for the plaintiff to show that an incumbrance, which existed when the covenant was made, has ripened into an adverse and superior title, and that there has been an eviction under it since the institution of the suit. Mosely v. Hunter, 199.
- 14.—EJECTMENT.—In an action of ejectment it is competent for the plaintiff to prove that the defendant, at the time he executed a deed relied on by the plaintiff, stated that the land conveyed was the same on which the defendant then lived. Wilkerson v. Moulder, 388.
15. RECORD.—Where the transcript of an execution, issued by a justice of the peace, and the constable's return of *nulla bona* thereon, has been filed in the office of the clerk of the circuit court, the validity of the execution thereon by the circuit court cannot be impeached in a collateral proceeding by showing that the transcript so filed varies from the original execution and return thereon. Coonce v. Munday, 3 Mo. 374, modified. Murray v. Laften, 397.
16. SLANDER.—In an action of slander, where the words spoken charged the plaintiff with stealing from one person, evidence that he stole from another person is not admissible. Self v. Gardner, 317.
17. ADMISSION.—In a controversy between the heirs and one who has married the widow of a deceased person, in reference to his property, the declarations of the widow are not admissible. Wall's Guardian v. Coppedge, 290.
18. REPLEVIN—DEFENSE—ESTOPPEL.—A. mortgaged certain chattels, of which he retained the possession. At a sheriff's sale, under an execution against A., these chattels were purchased by B., who brought replevin against A. Held, that A. is not estopped from setting up the defense that he had no interest in the goods subject to sale under execution. Yeldell v. Stemmons, 286.

19. ACCOUNT. The date at the head of an account does not preclude the plaintiff from proving the time when the various items accrued. It does not pre-suppose the entire indebtedness to have accrued prior to that time. Mooney v. Williams, 284.
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21. RES ADJUDICATA.—A question cannot become *res adjudicata* unless it is tried upon its merits. Bell v. Hoagland, 219.
22. SAME—EFFECT.—A matter *res adjudicata* is equally obligatory on both parties; if it does not bind both, it binds neither. Ibid.
23. SURVEY.—A survey, when examined and sanctioned as contemplated by law, is conclusive upon the government, upon all persons who claim under titles subsequent to the survey, and upon mere intruders and strangers without title; and it is *prima facie* evidence of locality against all persons who claim under an opposing title. McGill v. Somers, 61.

See CONTRACTS, FRAUD.

EXECUTION.

1. DELIVERY BOND—DEFENSE.—In an action on a delivery bond, a security in the bond is estopped from setting up, as a defense to the action, title in himself to the property levied on. Page v. Bulter, 56.
2. EXECUTION—U. S. MARSHAL'S SALE.—It is no objection to a sale of land made by a United States Marshal prior to the Act of Congress of May 19th, 1828, that it was not made in conformity to the laws of this State regulating sales under execution. Kennerly v. Shepley, 410.
3. EXECUTION—EQUITABLE INTEREST.—An equitable interest in chattels cannot be sold under execution. A sheriff must actually seize the property before he can sell. Yeldell v. Stemmons, 286.

See DOWER, TRESPASS, REAL ESTATE.

EXECUTORS AND ADMINISTRATORS.

1. PRACTICE—RIGHT OF ACTION.—Where a contract is made with one as administrator, he or his personal representatives, and not the administrator *de bunis non*, must bring suit on it. And this is not changed by the new Code. Harney v. Dutcher, 70.
2. ADMINISTRATOR—ACTIONS.—The executor or administrator is a full representative of the creditors of an estate, for the purpose of prosecuting and defending actions. Kennerly v. Shepley, 410.
3. FORCIBLE ENTRY AND DETAINER—ACTION BY ADMINISTRATOR.—Where there was a demise of premises by the intestate, the administrator cannot maintain an action of unlawful detainer. Holliday, adm'r, v. Doyon, 257.
3. COSTS—ACTION BY ADMINISTRATOR.—Where the cause of action accrued to the testator or intestate, in his lifetime, there, the adminis-

trator or executor, suing and failing to recover, is not liable for costs *de bonis propriis*; the judgment for costs will be *de bonis testatoris*; but where the cause of action accrues to the executor or administrator, and he sues and fails to recover, he shall pay costs himself.

Wooldridge, adm'r, v. Draper, adm'r, 308.

4. ADMINISTRATOR—EFFECTS UNADMINISTERED.—When the property in any of the effects of the deceased has been changed by the original administrator, and has vested in him, in his individual capacity, such effects will go to his own representatives, and not to the administrator *de bonis non* of his intestate.
Harney v. Dutcher, 70.
5. ADMINISTRATION—DE BONIS NON.—The principle of the common law, which entitled an administrator *de bonis non* to those goods only which remained in specie, and not administered on by the first administrator, is abolished by the system of administration introduced in this State.
State to use, etc., v. Hunter, 325.
6. ADMINISTRATION—BOND, ACTION ON.—An action on an administrator's or curator's bond may be instituted against a security before any indebtedness has been established, or any judgment obtained against the administrator or curator.
Oldham v. Trimble, 145.
7. SET-OFF—ACTION ON ADMINISTRATOR'S BOND.—In an action upon the bond of executors, against the principals and securities, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed.
State to use, etc., v. Medrell, 268.
8. EXECUTOR—ACTION AGAINST—PLEADING.—In an action against an executor, on his bond, to compel payment of an allowed demand, the petition must contain an averment that an order of the court has been made for its payment, and that assets have come to his hands that could lawfully be so applied.
Ibid.
9. ADMINISTRATION—BOND.—Executors who have given bond for the faithful performance of their trust, are jointly liable, as principals, to indemnify the surety, who has been subjected for the default of one of them, and that, too, though the default occurred after the death of one of the executors, and while the estate was under the sole management of the surviving executor.
Dobyns v. McGovern, 423.
10. ADMINISTRATION—BOND.—The grant of letters of administration and the execution of the bond are, under our law, parts of one and the same transaction, and the different acts may be brought together to show what was intended. If the given name of the deceased is left out of the bond, but inserted in the letters, there is a sufficient description by which the estate meant by the parties can be ascertained; and the letters, the bond referring to them, may be produced to explain the ambiguity.
State to use, etc., v. Price, 232.
11. ADMINISTRATION—SET-OFF.—A county or probate court has no jurisdiction to hear or decide upon a set-off, claimed by an administrator,

against a demand exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the debtor.

Dunnica v. Thomas' Adm'r, 242.

12. ASSETS—BURDEN OF PROOF.—In an action against an administrator *de bonis non*, the burden of proof is upon the plaintiff to show the amount of assets that went into his hands, and a failure to account for them.

State, to use of Taylor, v. Collins, 183.

13. ADMINISTRATION—CLASSIFICATION OF DEMAND.—A demand allowed and classed by the probate court cannot afterward be placed in a different class, except for such causes as would authorize the setting aside or modifying the judgment in other particulars.

Miller v. Janney's Ex'r, 167.

14. CLASSIFICATION.—The classification of a demand against an estate, if erroneous, should be appealed from when made. The county court has no right to change it at a subsequent term.

Nelson v. Russell's Adm'r, 216.

15. ADMINISTRATION—ALLOWANCE.—The allowance of a claim against an estate has the force of a judgment.

Kennerly v. Shepley, 410.

16. ENTRY.—The statute does not require that a classification of a demand should be entered on the record at large. An indorsement of the class on the claim itself, and an entry on the abstract book, is all that is required to give the allowance and classification validity.

Nelson v. Russell's Adm'r, 216.

17. CIRCUIT COURT—CONTROL OVER COUNTY COURT.—The sixth section of the act establishing courts, Revised Code, 330, giving to the circuit courts "a general control over executors, administrators, guardians, &c., to be exercised according to the rules, usages, and practice of courts of equity," is not to be so construed as to absorb the powers conferred by the 13th section of the same act upon the county courts. While an administration is pending in the county court, the circuit court has no power to compel the administrator to inventory property charged to belong to the estate.

Overton v. McFarland, 191.

18. ADMINISTRATION—LEX LOCI DOMICILII.—The administration of all the goods of an intestate, wherever situated, is to be made according to the law of his domicil. When they are in a different country, they are first applied, under the laws of that country, to the satisfaction of the claims of creditors who establish their claims under its laws; and if there are any of its citizens who claim as distributees, distribution of the assets will be made there. If there are distributees residing in the country of the intestate's domicil, or creditors there whose claims are unsatisfied, the tribunals of the country where the assets are found will direct the surplus to be remitted to the country of the domicil for further administration. Such transfer would complete the administration in the country where the assets were found.

Spraddling v. Keeton, 82.

19. SAME—PRINCIPAL AND ANCILLARY.—The administration granted in the State of the intestate's domicil, is the principal one, and that, in any

other State, is ancillary, and priority in administration has no effect on this question. Ibid.

FEES.

1. **CIRCUIT ATTORNEY—FEES.**—The circuit attorney is not entitled to a fee for an appearance in cases arising under the statute forbidding free negroes to reside in the State without license.

Lackland v. Dougherty, 165.

FORCIBLE ENTRY AND DETAINER.

1. **ACTION BY ADMINISTRATOR.**—Where there was a demise of premises by the intestate, the administrator cannot maintain an action of unlawful detainer. Holliday, adm'r, v. Doyon, 257.
2. **APPEAL.** In an action of forcible entry and detainer, if on appeal the affidavit and recognizance are defective, the appellant has a right to file sufficient ones within such time as will not delay the other party.

Hamilton v. Jeffries, 393.

FRAUD.

1. **FRAUDULENT CONVEYANCE.**—Pecuniary embarrassment at the time of the sale of property is not sufficient to raise a presumption of fraud, in the absence of proof that such embarrassment was succeeded by insolvency or inability to discharge obligations. Hickey v. Ryan, 49.
2. **FRAUDULENT CONVEYANCE—EVIDENCE.**—The continued possession of personal property, after the sale of it, is presumptive evidence of fraud, and becomes conclusive, unless the vendee shows that the sale was made in good faith and without any intent to defraud creditors. Kuykendall v. McDonald, 263.
3. **FRAUDULENT CONVEYANCE—VOID AS A MATTER OF LAW.**—If a conveyance on the face of it appears to be for the use of the person making it, the court will, as a matter of law, declare it to be void as against creditors. Robinson's Ex'rs v. Robards, 297.
4. So, too, if there is a conveyance of chattels for a consideration not deemed valuable in law, which is not accompanied by possession nor recorded. Ibid.
5. **CONVEYANCE TO USE OF GRANTOR.**—A conveyance in consideration that the grantee would support the grantor and his family, is a conveyance to the use of the grantor. Ibid.
6. **FRAUDULENT CONVEYANCE.**—A deed, although made for a valuable and adequate consideration, may still be void as to the creditors of the grantor, because of the intent with which it was made. Cason v. Murray, 235.
7. **SAME—INTENT.**—The intent, which under the law avoids a deed as to creditors, is an intent to "hinder, delay, or defraud" them. An intent to prevent a sacrifice of the debtor's property is not sufficient. Ibid.
8. **FRAUD—QUESTION FOR JURY.**—In all cases arising under the 10th section of the act concerning fraudulent conveyances, the jury are the

triers whether the transaction is fraudulent or not. And in order to take a sale of goods out of the statute, it must not only be for a valuable consideration, but also *bona fide*.

Kuykendall v. McDonald, 263.

9. FRAUD—PRICE.—In determining the question of fraud, inadequacy of price is a circumstance of great weight.

Robinson's Ex'rs vs. Robards, 297.

10. CREDITOR—PREFERENCE.—A debtor may give a preference to a particular creditor, or set of creditors, by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere screen to secure the property to himself.

Kuykendall v. McDonald, 263.

11. INSOLVENT—PREFERENCE.—A debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others; and such disposition of his effects is not impeachable on the ground of fraud, even though it embraces all his property.

Cason v. Murray, 235.

12. FRAUD.—A county court has power to set aside the settlement of a collector for fraud at any time during the term.

Price v. Johnson County, 278.

FRAUDS—STATUTE OF.

1. SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.—The payment of the purchase money, the delivery of possession, and the making of valuable improvements, will avoid the plea of the statute of frauds, and entitle the grantee to the specific performance of a contract for the conveyance of real estate.

Johnson v. McGruder, 222.

2. AGENT—TITLE BOND—SPECIFIC PERFORMANCE.—Although a title bond be executed by an agent in such a manner as to prevent its operating at law as the agreement of the principal, yet, in equity, it would be regarded as a sufficient note or memorandum to defeat a bar to its specific performance founded on the statute of frauds, it appearing that the agent was authorized and intended to bind his principal.

Ibid.

3. AGENT—VERBAL AUTHORITY.—A verbal authority to an agent to make a contract relative to the sale of lands is valid, and not within the statute of frauds.

Ibid.

GARNISHMENT.

1. NOTE.—A judgment cannot be rendered against a garnishee on a negotiable note that had been assigned before the service of the garnishment.

Walden v. Valiant, 258.

GUARANTY.

1. GUARANTY.—Wilson purchased of Eddy & Co. \$617.35 worth of goods, and Sturgeon, by a written guaranty, bound himself to pay, or see that Wilson paid, four hundred dollars of the amount, within ninety Mo. R. VOL. XV.

days. Wilson, within ninety days, paid two hundred dollars, and it was held that it extinguished Sturgeon's guaranty that amount.

Eddy v. Sturgeon, 127.

GUARDIAN AND WARD.

1. BOND, ACTION ON.—An action on an administrator's or curator's bond may be instituted against a security before any indebtedness has been established, or any judgment obtained against the administrator or curator.
Oldham v. Trimble, 145.
2. GUARDIAN—FINAL SETTLEMENT.—After a final settlement by a curator the ward may file a bill in equity, surcharging and falsifying his accounts; but such final settlement is a good defense to an action at law.
Ibid.
3. CONTRACT—NON COMPOS.—Even if the conveyance of an insane person is voidable only, it may be avoided by the guardian of the insane person.
Tolson's Adm'r v. Garner, 327.

HUSBAND AND WIFE.

1. CHOSSES IN ACTION.—Where a chattel is bequeathed to the wife for life and the husband, before he receives it from the executor, sells it, and the purchaser takes and retains the possession, it is such a reduction of property in possession, by the husband, as bars the wife's right of survivorship.
Abington v. Travis, 156.
2. ATTACHMENT—INTERPLEA.—In an action by attachment against the husband, the wife cannot appear by next friend and file her interplea. If she has any claim to the property attached, it must be asserted in a court of chancery.
Withers v. Shropshire, 404.

INFANCY.

1. DECREE IN EQUITY.—A decree in a chancery cause against an infant for want of an answer, and without proof of the statements of the bill, is erroneous.
Heath's Adm'r v. Ashley's Adm'r, 294.

INJUNCTION.

1. APPEAL.—A refusal to grant an injunction is not a final determination of the cause, within the statute, and an appeal from it will not lie.
Harrison v. Rush, 115.
2. NATURE AND EFFECT.—An injunction is a release of errors at law, and the proceedings on it are not appellate in their nature.
Price v. Johnson Co., 278.

JUDGMENT.

1. TRESPASS.—If a judgment was valid at the time it was rendered, and proceedings have been taken under it, and it is afterwards set aside, the avoidance does not, by relation, affect the proceedings, and make those who instituted them trespassers *ab initio*.
Bank of Missouri v. Franciscus, 187.

2. ADMINISTRATION—ALLOWANCE.—The allowance of a claim against an estate has the force of a judgment.

Kennerly v. Shepley, 410.

See EXECUTORS AND ADMINISTRATORS.

JURISDICTION.

1. JURISDICTION.—The Law Commissioner of St. Louis has no jurisdiction in an action on a penal bond in the sum of two hundred dollars. In actions on such bonds, the judgment is always for the penalty, which determines the jurisdiction of the court.

St. Louis, to use of Yeatman, v. Fox, 55.

2. EQUITY—COURT OF—JURISDICTION.—When a court of equity has cognizance of a subject, its authority over it is not lost by reason of a concurrent jurisdiction being conferred upon another tribunal.

Dobyns v. McGovern, 423.

3. PARTITION—JURISDICTION.—Under the statute regulating partition, the circuit court has no jurisdiction to make partition of real estate situated in another county, unless it is divided by a county line, or all the parties in interest are adults, and parties to the petition.

Yount v. Yount, 240.

See COURTS, JUSTICES OF THE PEACE, EQUITY.

JURY.

1. SEPARATION.—It is not error for the court to permit the separation of the jury in a criminal case when the parties consent thereto.

State v. Mix, 100.

2. PRACTICE—CRIMINAL.—An indictment for misdemeanor may, by consent of parties, be tried by a jury of less than twelve.

State v. Hall, 386.

JUSTICES OF THE PEACE.

1. JUSTICE COURT—APPEAL.—Notice of an appeal from a justice's court is still necessary, notwithstanding a continuance may have been granted at the first term for want of it, unless the appellee appears, or does some act which is tantamount to or a waiver of notice.

McCabe v. Lecompte, 59.

2. The return of a constable on a warrant against a steamboat, showing that he executed it, by going on board the boat, and by reading the same to the clerk, and by finding the sheriff in charge of her, is sufficient to give the justice issuing the warrant jurisdiction to hear and determine the case against the boat.

Parkinson v. Steamboat Robert Fulton, 165.

See APPEALS.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—RENT.—The lessees of a mill are bound to

pay the rent, notwithstanding the main posts of the building, supporting all the machinery, were decayed, in consequence of which the building fell and destroyed all the machinery. The defect in the posts was an infirmity to which all timbers are subject, and their liability to such a defect was equally in the knowledge of both parties.

Davis' Adm'r v. Smith, 307.

LAWS.

1. CONSTRUCTION.—The act of March 3, 1851, to increase the salaries of the judges in St. Louis county, does not leave the payment of additional compensation discretionary with the County Court.
Hamilton & Treat v. St. Louis County Court, 5.
2. CONSTRUCTION.—A thing which is in the intention of the makers of a statute, is as much within the statute as if it were within the letter.
Riddick v. Walsh, 347.
3. CONSTITUTIONAL LAW.—An act of the General Assembly authorizing and requiring a County Court to pay out of the county treasury an additional compensation to judges who receive a stated salary from the State, is not repugnant to the seventh and nineteenth sections of the declaration of rights. Hamilton & Treat v. St. Louis Co. Court, 5.
4. LAWS.—The statute authorizing courts in certain cases to refer issues of fact to referees is not unconstitutional.

Shepard v. Bank of Missouri, 95.

LIENS.

See MECHANICS' LIENS.

LIMITATIONS.

1. LIMITATIONS.—Where the plaintiff and defendant were non-residents of this State at the time of contracting the debt, and the defendant afterwards removed to this State, the statute of limitations did not begin to run in his favor, until he came into this State.
Tagart, Adm'r, v. State of Indiana, 132.
2. BONDS—PRESUMPTION OF PAYMENT.—The common law presumption of payment, after the lapse of twenty years, applies to bonds executed prior to the year 1835.
Smith's Ex'r v. Benton, 229.

MARITIME LAW.

1. MARITIME LAW—POWER OF MASTER.—The captain of a boat, as such, has no right to sell the boat, or any part thereof, without special authority therefor from the owners.

Kelley v. Dickinson, 126.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MECHANICS' LIENS.

1. MECHANICS' LIENS.—The Act of February 24th, 1843, in reference to mechanics' liens, which was applicable solely to St. Louis county, repealed only so much of the general law as was repugnant to its provisions. *Schuelenburg v. Gibson*, 176.
2. TIME FOR FILING—CONTRACTOR—Hence a person furnishing material for a building in that county, under a contract with the owner, must file his lien within six months from the time his demand accrues.

Ibid.

MISNOMER.

See PRACTICE IN CRIMINAL CASES.

MORTGAGE.

1. MORTGAGE.—The rights of one advancing money on the faith of property in the possession of another, who has the legal title, without any knowledge of the rights of others, will be protected.

Block v. Chase, 210.

PARTITION.

1. JURISDICTION.—Under the statute regulating partition, the circuit court has no jurisdiction to make partition of real estate situated in another county, unless it is divided by a county line, or all the parties in interest are adults, and parties to the petition.

Yount v. Yount, 240.

PARTNERSHIP.

1. PARTNERSHIP.—If a firm executes a note to one of its members, he cannot sue on it, at law, nor can his assignee. The assignment cannot create a right to sue, when the assignor has no such right.

Hill v. McPherson, 130.

2. PARTNERSHIP.—Private stipulations, between partners do not affect the public, or those who deal with them, without notice of their agreement.

Cargill v. Corby, 270.

3. PARTNERS—POWERS.—The general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority, and may be rebutted by notice of the absence of such authority.

Ibid.

4. PARTNERSHIP—WHAT CONSTITUTES.—An agreement, by which one is to furnish a circular saw mill, and hands and stock to saw, and another is to furnish logs, and feed for the hands and stock, and the lumber to be divided equally between them, does not constitute a partnership.

Stoallings v. Baker, 318.

PLATS, CITY AND TOWN.

1. TOWN PLATS—LOTS FOR PUBLIC USE.—Glascock filed in the office of the recorder of Marion county, a duly acknowledged plat of the town of Hannibal. Amongst other memoranda on the map was the following: "lots numbered 2, 3, 4 in block 26 is intended for church grounds," and across the lots were written the words "church ground." Held

sufficient, under the act concerning plats of towns and villages, to vest the fee in the county for public use.

City of Hannibal v. Draper, 406.

PLEADINGS.

See PRACTICE IN CIVIL CASES.

PRACTICE IN CIVIL CASES.

ACTIONS.

1. PRACTICE—RIGHT OF ACTION.—Where a contract is made with one as an administrator, he, or his personal representatives, and not the administrator *de bonis non*, must bring suit on it. And this is not changed by the new Code. Harney v. Dutcher, 70.
2. SURETY—CONTRIBUTION.—A surety may use the name of the creditor in a suit to enforce contribution from a co-surety. McCourtney v. Sloan, 72.
3. ADMINISTRATOR—ACTIONS.—The executor or administrator is a full representative of the creditors of an estate, for the purpose of prosecuting and defending actions. Kennerly v. Shepley, 410.
4. ACTIONS—PARTIES.—The maker and endorser of a promissory note may be jointly sued by the endorsee. Holland v. Hunton, 312.

PLEADINGS.

5. PLEADINGS.—A petition is good which charges an original liability on defendant for services rendered a third person. Wing v. Campbell, 174.
6. EXECUTOR—ACTION AGAINST—PLEADING.—In an action against an executor, on his bond, to compel payment of an allowed demand, the petition must contain an averment that an order of the court has been made for its payment, and that assets have come to his hands that could be lawfully so applied. State, to use, etc., v. Modrell, 268.
7. It appeared that defendants signed an obligation to pay to the State of Missouri the sum of ten thousand dollars upon a failure to perform certain conditions, but the conditions were not stated in the petition, and the bond was not upon the record. *Held*, that the petition was insufficient. Woods v. Rainey, 321.
8. ACTION—ACCOUNT.—Form of declaration approved. Hughs v. Woosley, 326.
9. DEMURRER.—A demurrer does not admit the items of an account set forth in a petition. If judgment be given on demurrer to such a petition, and the defendant refuses to answer, an inquiry of damages becomes necessary. Darrah v. Steamboat Lightfoot, 122.
10. ANSWER.—A general averment, by a defendant, that he does not owe the money sued for, or any part thereof, is not sufficient under the new Code; he must answer the plaintiff's petition, by stating the facts upon which he relies. Sappington v. Jeffries, 402.
11. DISCHARGE IN BANKRUPTCY.—A bankrupt sued for a debt contracted before his bankruptcy, must plead his certificate of discharge in bar of the action. Bank of Missouri v. Franciscus, 187.

12. **CONDITION PRECEDENT.**—If a day be appointed for the payment of money, which may happen before the act which is the consideration for such payment may be performed, an action may be brought for the money before performance of such act; such act is not a condition precedent.
Smith v. Busby, 244.

13. **AFFIDAVIT.**—At the bottom of an answer signed by a defendant, a magistrate of the District of Columbia appends his statement that the defendant personally appeared before him and made oath that the facts stated in the answer were true; it is a substantial compliance with the act regulating practice in courts of justice.
Smith's Ex'r v. Benton, 229.

TRIAL AND ITS INCIDENTS.

14. **PRACTICE—IMPERFECT COUNTS.**—A motion to strike out imperfect counts from a declaration must be made before the jury is sworn or the trial submitted to the court, and upon reasonable notice to the adverse party.
State, to use of, etc., v. Price, 232.

15. **PRACTICE—DEFAULT.**—A defendant having permitted judgment by default to go against him, has no right, on an inquiry of damages, to offer any evidence in denial of the plaintiff's right of action. The default admits the plaintiff's right of action.
Froust v. Bruton, adm'r, 395.

16. **AMENDMENTS.**—The Act of 1849 allows amendments even at the trial to avoid a non-suit on account of a variance. Still, the cause of action for which the plaintiff recovers must be the same which he charges against the defendant.
Butcher v. Death, 169.

17. **JURY—SEPARATION.**—It is not error for the court to permit the separation of the jury before verdict, when the parties consent thereto.
State v. Mix, 100.

18. **PRACTICE.—AGREED CASE.**—An agreed case stands in lieu of a special verdict, and upon it the court pronounces the conclusion of law.
Munford v. Wilson, 355.

19. **PRACTICE—INSTRUCTIONS—FACTS ADMITTED BY THE PLEADINGS.**—The duty of the court to tell the jury what questions of fact are to be tried and what facts stand admitted by the pleadings, is not changed by the Act of 1849, regulating practice in courts of justice.
Butcher v. Death, 169; Steil v. Ackli, 182.

20. **INSTRUCTION—ERROR.**—The correctness of the action of the court below, in giving or refusing instructions, will be examined, though not made a ground of error in a motion for a new trial.
Fine v. Rogers, 195.

21. **INSTRUCTION.**—An instruction which refers a matter of law to the jury is erroneous.
Hickey v. Ryan, 49.

22. **INSTRUCTION.**—A judgment will not be reversed for the refusal of instructions, if the instructions given present to the jury a correct and full statement of the law governing the case. Pond v. Wyman, 116.

23. **SAME.**—If two instructions, each improper in itself, amount to a correct statement of the law, when taken together, the error in each will be disregarded.
Ibid.

24. INSTRUCTIONS.—The judgment of the court below will not be reversed for a refusal to give instructions, provided it appears from the record that the law of the case has been laid down properly and fairly by the court, in the instructions which were given to the jury.
State v. Floyd, 213.
25. INSTRUCTION.—If the instructions given present the case fairly to the jury their verdict will not be disturbed, notwithstanding instructions, containing correct principles of law, have been refused.
Phillips v. Smoot, 380.
26. NEW TRIAL—VERDICT AGAINST EVIDENCE.—The supreme court will not interfere with a judgment upon the ground that the verdict is against evidence, or against the weight of evidence.
Garneau v. Herthel, 124.
27. NEW TRIAL—WEIGHT OF EVIDENCE.—Where the case involves only the consideration of the weight of the evidence, the supreme court will not interfere. Thompson v. St. Louis Perp. Ins. Co., 175.
- 28.—NEW TRIAL—EVIDENCE.—When the supreme court is asked to reverse a judgment of the circuit court, because competent evidence was rejected, it must appear on the record that the evidence rejected might and ought to have had some influence in finding a verdict on the questions of fact. Roussin v. St. Louis Perp. Ins. Co., 158.
29. NEW TRIAL—DISCRETIONARY POWER.—It must be very clearly seen that the discretionary power vested in the circuit court has been abused, before its judgment will be reversed on that account.
State v. Floyd, 213.
30. NEW TRIAL.—When no instructions have been given or refused—no action of the court complained of—the finding of the jury will not be disturbed.
Given v. Cody, 175.
31. NEW TRIAL—ERROR.—The supreme court will not reverse a judgment, unless it appears that error was committed by the circuit court materially affecting the merits of the case. Gobin v. Hudgens, 253.
32. EXCEPTIONS.—When objection is made to the admission of evidence, the bill of exceptions must show the grounds of such objection.
Roussin v. St. Louis Perp. Ins. Co., 158.
33. BILL OF EXCEPTIONS.—It is the duty of the party complaining of the finding of the court below, to preserve the evidence upon which the decree of the court was based, so as to show the matters of law or fact of which he complains. Knox v. Wright, 154.
34. BILL OF EXCEPTIONS.—It does not follow that every motion made in a cause becomes part of the record, because the clerk, in copying the proceedings, may insert it. It must be made a part of the record by a bill of exceptions.
State v. Bachelor ; same v. Kitchen ; same v. Wall, 131.
35. ABATEMENT.—When no *scire facias* has been sued out for the purpose of substituting a person as plaintiff or defendant, in the place of the original plaintiff or defendant before the expiration of the third day of the second term after the death of the original party has been suggested, the necessary consequence is the abatement of the suit.
Ranney v. Bostic, 138.

36. PRACTICE.—Practice act of 1849 construed.
Holland v. Hunton, 312.
37. PRACTICE.—Art 15, § 3 of the Practice act of 1849 construed.
Skinner v. Ellington, 323.
38. PRACTICE ACT OF 1849—DETINUE.—Under the new practice, there is no longer any action of detinue, nor any power to issue a *capias* in such action.
Morris v. Chamberlin, 155.
39. COMPROMISE.—One who, with a knowledge of all the facts, compromises a suit, and gives his note in accordance with the terms of the compromise, cannot when sued on such note set up a defense which he might have interposed to the original suit.
Draper v. Owsley, 391.
40. EXTENSION OF TIME.—Leave of the court extending the time of replying to a set-off, working no injury to the opposite party, and not affecting the merits of the controversy, although apparently supported by no good reason, is not such an error as will induce a reversal of the judgment.
Beach v. Curle's Adm'r, 78.
41. VARIANCE.—When the petition describes writings as promissory notes, and it turns out in proof that they are also negotiable, there is no variance; and if the description of a note is silent as to its bearing interest, when in fact it does bear interest the variance is such as to authorize the court to disregard it.
Ibid.

See CONTRACTS, EVIDENCE, ESTOPPEL.

PRACTICE IN CRIMINAL CASES.

1. ERROR—INSTRUCTION.—Error in the admission of illegal testimony against the accused cannot be cured by an instruction withdrawing such testimony from the jury.
State v. Mix, 100.
2. ERROR.—If illegal testimony has been admitted against the objection of the accused, the error cannot be cured by an instruction withdrawing such testimony from the jury.
State v. Wolff, 110.
3. PRACTICE IN CRIMINAL CASES—ASSIGNMENT OF ERRORS.—No assignment of errors is required by law to be made in criminal cases.
State v. Dame, 166.
4. CRIMINAL LAW—INDICTMENT.—An indictment for selling liquor without license is good.
State v. Wishon, 334.
5. INDICTMENT—DEFECTIVE COUNT.—If one of several counts in an indictment be good, a motion to quash ought not to be sustained. The defendant should move to quash the defective count, and not the whole indictment.
Ibid.
6. INDICTMENT—GENERAL VERDICT.—One good count in an indictment will support a judgment after a general verdict of guilty.
Ibid.
7. INDICTMENT.—An indictment, charging the selling of one pint of whisky, without a dramshop, tavern, grocers, merchants, or any other kind of license, is sufficient.
State v. Owen, 337.
8. INDICTMENT.—An indictment on the statute prohibiting the torture of animals, (Rev. Stat. 406) must set out the means of producing the torture, so that the court may see that such means have the inevitable

- and natural tendency to produce the effect in which the criminality consists. State v. Puck, 340.
9. **INDICTMENT—MISNOMER.**—Hutson, for Hudson, in an indictment, is not a misnomer. State v. Hutson, 343.
10. **INDICTMENT.**—An indictment for Sabbath breaking, charging that the labor was not "a work of daily necessity," is bad. The word "daily" is not used in the statute in this connection. State v. Stone, 344.
11. **CRIMINAL LAW—INDICTMENT.**—An indictment, charging that the defendant did "unlawfully sell one-half pint of brandy, of the value of ten cents, to one William Pryor, and suffered the same to be drank at the place of sale, without then and there having a grocer's license, dramshop-keeper's license, an inn-keeper's license, or any legal authority to sell said brandy, in manner and form aforesaid," is good. The negation as to license is broad enough. State v. Hornbeak, 316.
12. **CRIMINAL LAW—INDICTMENT.**—An indictment for obstructing process must recite the writ, in order that the court may see that it was such a writ as the officer had a right to execute. State v. Henderson, 322.
13. **CRIMINAL LAW—INDICTMENT.**—In an indictment for selling liquor without license, the name of the person to whom sold, and the price, need not be stated. State v. Ladd, 275.
14. **CRIMINAL LAW—INDICTMENT.**—An indictment charging the sale of one quart of whisky, and suffering the same to be drank at the place of sale without a grocer's, dramshop-keeper's or inn-keeper's license, is bad. The negation is not broad enough. A tavern license ought to have been negatived. State v. Haden, 289.
15. **PRACTICE—CRIMINAL.**—Under an indictment for practicing medicine without license, the State is not required to prove the actual receipt of compensation by the defendant. State v. Hale, 336.
16. **PRACTICE—CRIMINAL—JURY.**—An indictment for misdemeanor may, by consent of parties, be tried by a jury of less than twelve. Ibid.
17. **DRAMSHOP—LICENSE.**—A license must be obtained by any person wishing to sell intoxicating liquors in a less quantity than one quart, State v. Owen, 337.

See PRACTICE IN CIVIL CASES, 17, 24, 29.

PUBLIC LANDS.

1. **EVIDENCE—RECORDER'S CERTIFICATE.**—A certificate of confirmation issued by the recorder under the act of 26th May, 1824, is only *prima facie* of a confirmation under the act of the 13th of June, 1812. McGill v. Somers, 61.
2. **SAME—RECORDER HUNT'S DESCRIPTIVE LIST.**—The descriptive list sent to the surveyor's office, by authority of the act, is evidence of as high a character as the certificate would be, and a properly authenticated extract from it is entitled to all the effect that the original certificate would have. Ibid.
3. **SURVEY—EFFECT OF.**—A survey when examined and sanctioned as contemplated by law, is conclusive upon the government, upon all per-

sons who claim under titles subsequent to the survey; and, upon mere intruders and strangers without title; and it is *prima facie* evidence of locality against all persons who claim under an opposing title.

Ibid.

4. TITLES—CONFLICTING.—If two titles properly located and covering the whole or part of the same land, are of the same age and description, the defendant being in possession cannot be disturbed. Ibid.
5. TITLES TO LAND—CONFIRMATION.—A confirmation under the first section of the act of 13th June, if, of a common field lot, is superior to an opposing title, which stands alone upon a confirmation, under the act of 29th April, 1816. Ibid.
6. SAME.—A confirmation under the act of 1816, when properly surveyed, is superior to a New Madrid location. Ibid.
7. TITLES TO LAND—CONFIRMATION.—The 2nd section of the act of Congress of the 3d March, 1807 (2 U. S. Statutes at large, 440), only directs the board of commissioners to confirm such claims as may be brought within its provisions, by evidence produced before them; and does not import a present confirmation, by the direct action of Congress upon the claims. Burgess v. Gray, 142.
8. TITLE—INCHOATE SPANISH.—Until an inchoate title, originating under the Spanish government, has been confirmed, it has no standing in a court of law or equity. Ibid.

REAL ESTATE.

1. DEEDS—CONSTRUCTION.—Known and fixed monuments, called for in a grant or deed, control the courses and distances stated in the same instrument. McGill v. Summers, 61.
2. CONVEYANCE.—The word "heirs" in a conveyance is necessary to pass a fee simple. Leitensdofer v. Delphy, 106.
2. DEED—DESCRIPTION—PAROL EVIDENCE.—However vague the description in a sheriff's deed of land sold under execution, parol evidence is admissible to identify the premises, and show that in the community where the sale took place, they are known by the description given. Such evidence does not fall within the rule which rejects oral testimony in explanation of a ambiguity. Bates v. Bank of Missouri, 190.
4. STATUTORY COVENANTS—DAMAGES.—For the breach of the statutory covenants, the recovery can only be for nominal damages, unless there has been an eviction. Mosely v. Hunter, 199.
5. TOWN PLATS—LOTS FOR PUBLIC USES.—Glasscock filed in the office of the recorder of Marion county, a duly acknowledged plat of the town of Hannibal. Amongst other memoranda on the map was the following: "lots numbered 2, 3, 4 in block 56 is intended for church grounds," and across the lots were written the words "church ground." Held sufficient, under the act concerning plats of towns and villages, to vest the fee in the county for public use. City of Hannibal v. Draper, 406.
6. DEDICATION—EVIDENCE OF.—When the proprietors of town property, lay it out into lots, with streets and avenues running through it,

and sell their lots with reference to such plats, such conduct, on their part, will be a dedication of the streets and alleys to the public, and they cannot afterwards resume their control over them; and this principle is equally applicable to a dedication of ground for any other public use. Ibid.

7. **TITLE BOND.**—A bond to convey by a deed with general warranty, is not satisfied by the mere execution of a formal instrument, with covenants of title, but implies that the obligor will convey an indefeasible estate, and that his deed shall be operative for that purpose.

Smith v. Busby, 244.

8. **AGENT—TITLE BOND—SPECIFIC PERFORMANCE.**—Although a title bond be executed by an agent in such manner to prevent its operating at law, as the agreement of the principal, yet, in equity, it would be regarded as a sufficient note or memorandum to defeat a bar to its specific performance, founded on the statute of frauds, it appearing that the agent was authorized and intended to bind his principal.

Johnson v. McGruder, 222.

9. **SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.**—The payment of the purchase money, the delivery of possession, and the making of valuable improvements, will avoid the plea of the statute of frauds, and entitle the grantee to the specific performance of a contract for the conveyance of real estate. Ibid.

See DAMAGES.

REPLEVIN.

1. **SPECIAL PROPERTY—POSSESSION.**—A party who never has had the actual possession of personal property, and who is not the general owner cannot maintain replevin, against a party in actual possession. A person having only a special property, or an interest of a temporary or limited nature, must have had the possession.

Holliday v. Lewis, 255.

2. **DEFENSE—ESTOPPEL.**—A. mortgaged certain chattels of which he retained the possession. At a sheriff's sale, under an execution against A., these chattels were purchased by B., who brought replevin against A. *Held*, that A. is not estopped from setting up the defense that he had no interest in the goods subject to sale under execution.

Yeldell v. Stemmons, 286.

RES ADJUDICATA, See EVIDENCE, 21,22.

REVENUE.

1. **TAXATION.**—The 19th section of the declaration of rights does not require equality in taxation. The property to be taxed is left to the discretion of the General Assembly; but, when selected it must be taxed in proportion to its value.

Hamilton & Treat, v. St. Louis Co., 5.

2. **REVENUE—TAXES—VOLUNTARY PAYMENT.**—Taxes paid to a city collector, with a full knowledge of all the facts, the city having a color of right to collect them, must be regarded as voluntary, and not made

- under such circumstances, as will authorize the party paying them to recover them back. Walker v. City of St. Louis, 361.
3. TAXES—ILLEGAL.—The proper mode of resisting the payment of a tax, part of which is illegal, is to tender the amount really due and resist the payment of the balance. Ibid.
4. ST. LOUIS—LANDS NOT LAID OFF.—Under the act of February 8th, 1843, reducing into one the several acts relative to the incorporation of the city of St. Louis, lands not laid off into blocks and lots, may be taxed according to their actual value; and there is nothing in the act requiring the corporation to tax them according to the supposed profits that might be made from them, were they used for agricultural purposes. Benoist v. City of St. Louis, 426.
5. FRAUD.—A county court has power to set aside the settlement of a collector for fraud at any time during the term. Price v. Johnson County, 278.

SALE.

1. CONTRACT.—RESCISSION OF.—The rescission of a contract for sale of a lot of goods, with warranty, must be entire. The vendee cannot select such as will answer the warranty and return the remainder. Sigerson v. Harker, 78.
2. SALE—DELIVERY.—The delivery by a vendor to a vendee of an order on a depository for goods sold is a delivery of the goods. Ibid.

SCHOOLS.

1. SCHOOL FUND.—A county court having loaned township school funds at ten per cent. has no right, upon the application of the inhabitants of the township, to reduce the rate of interest. Veal v. Chariton County Court, 261.
2. SCHOOL FUND.—The failure of the county court to take a mortgage on unincumbered real estate to secure the payment of a bond given for school money loaned, does not discharge the surety in such bond. Marion County v. Moffat's Adm'r, 384.

SETS-OFF.

1. SETS-OFF.—An assignment in full of a note not negotiable can not be canceled so as to defeat set-offs which the maker may have against the assignee. Billings v. Atchinson, 54.
2. ADMINISTRATION.—A county or probate court has no jurisdiction to hear or decide upon a set-off, claimed by an administrator, against a demand exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the debtor. Dunnica v. Thomas' Adm'r, 242.
3. ACTION ON ADMINISTRATOR'S BOND.—In an action upon the bond of executors, against the principals and securities, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed. State, to use &c., v. Modrell, 268.



SLANDER.

1. EVIDENCE.—In an action of slander, where the words spoken charged the plaintiff with stealing from one person, evidence that he stole from another person is not admissible. *Self v. Gardner*, 317.

SLAVERY.

1. SLAVERY—REMOVAL TO FREE STATE.—The voluntary removal of a slave, by his master, to a State or Territory in which slavery is prohibited, with a view to a residence there, does not entitle the slave to sue for his freedom, in the courts of this State. Overruling, 1 Mo. 372; 2 Mo. 19 *id.* 36; 3 Mo. 194; *id.* 270; *id.* 400; 4 Mo. 350; *id.* 592. *Gambles, J.*, dissenting. *Scott v. Emerson*, 366.
2. The fact that under the ordinance of 1787 a slave was entitled to his freedom cannot be set up as a defense to an action against a steamboat for transporting a slave from the State without the consent of his master, it appearing that the slave had never asserted his right to freedom. *Calbert v. St. Bt. Timoleon*, 380.

SUPREME COURT.

1. SUPREME COURT—PRINTED DECISIONS.—The printed decisions of the Supreme Court cannot be resorted to as guides in amending its records. *State, to use of Zeigler, v. St. Gemme*, 140.
See PRACTICE IN CIVIL CASES AND PRACTICE IN CRIMINAL CASES.

SURETIES.

1. CO-SURETY—CONTRIBUTION.—A surety may use the name of the creditor in a suit to enforce contribution from a co-surety. *McCourtney v. Sloan*, 72.
2. ADMINISTRATION—BOND.—Executors who have given bond for the faithful performance of their trust, are jointly liable, as principals, to indemnify the surety, who has been subjected for the default of one of them, and that, too, though the default occurred after the death of one of the executors, and while the estate was under the sole management of the surviving executor. *Dobyns v. McGovern*, 423.
3. SCHOOL FUND.—The failure of the county court to take a mortgage on unincumbered real estate to secure the payment of a bond given for school money loaned, does not discharge the surety in such bond. *Marion County v. Moffett, Adm'r*, 384.
4. SURETY—NOTICE.—A verbal notice by a security to the person having the right of action to sue the principal debtor is not sufficient; it must be in writing. *Sappington v. Jeffries*, 402.
5. SURETY—SERVICE OF NOTICE.—Nor is it sufficient to serve such notice on the agent or attorney of the person having the right of action. *Ibid.*

See EXECUTORS AND ADMINISTRATORS.

TRESPASS.

1. JUDGMENT—PROCEEDINGS UNDER—WHEN SET ASIDE.—If a judgment was valid at the time it was rendered, and proceedings have been taken

under it, and it is afterwards set aside, the avoidance does not, by relation, affect the proceedings, and make those who instituted them trespassers *ab initio*.
Bank of Missouri v. Franciscus, 187.

WILLS.

1. WILLS—CONSTRUCTION.—The testator's understanding of the words used in his will, ascertained from the will itself, must be adopted in construing the will.
Dugans v. Livingston, 151.

WITNESS.

1. WITNESS.—When two persons are jointly indicted, neither is admissible as a witness for his co-defendant, whether they are tried jointly or separately.
State v. Roberts, 16.
2. WITNESS.—If a witness willfully testify falsely to any material fact in the case, the jury are authorized to discredit or reject the whole testimony.
State v. Mix, 100.
3. WITNESS.—A mere formal party, standing indifferent to the real parties in interest, may be examined as a witness. Block v. Chase, 210.
4. WITNESS—COMPETENCY.—A clerk who pays out the money of his employer by mistake, is a competent witness for his employer in an action to recover it back.
Burd v. Ross, 163.

See EQUITY.